IN THE

Supreme Court of the United States

OCTOBER TERM, 1942.

No. 831

THE HARTFORD ELECTRIC LIGHT COMPANY, *Petitioner*,

against

FEDERAL POWER COMMISSION, *Respondent*.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

PETITION.

Your Petitioner, The Hartford Electric Light Company, respectfully shows as follows:

The Hartford Electric Light Company, Petitioner, hereby petitions this Honorable Court for a writ of certiorari to be issued to review a judgment of the United States Circuit Court of Appeals for the Second Circuit entered February 2, 1943, affirming orders of the Federal Power Commission dated February 25, 1941, and October 21, 1941. The opinion of the Circuit Court of Appeals is reported at 131 F. (2d) 953. The opinions and orders of the Federal Power Commission are reported at 37 P. U. R. (N. S.) 193, and 44 P. U. R. (N. S.) 515; they appear at R. 1060 and 1276.

Nature of Proceedings Below.

This proceeding originated in an order issued June 16, 1936, (R. 821) by the Federal Power Commission (referred to herein as "Commission"), adopting a Uniform System of Accounts for Public Utilities and Licensees subject to the provisions of the Federal Power Act, and in an order dated May 11, 1937, (R. 842) by the Commission, directing all public utilities and licensees subject to its jurisdiction to submit certain data and statements relative to their property and accounts. Petitioner did not respond to these orders. On June 14, 1939, the Commission ordered Petitioner to show cause why it should not comply (R. 21). Thereupon, Petitioner appeared specially before the Commission and denied jurisdiction upon the ground that Petitioner is not a "public utility" or "licensee" within the the terms of the Federal Power Act (R. 24). The matter was referred to a trial examiner (R. 59) who took testimony (R. 62-1055), received briefs, and heard oral arguments (R. 1057).

Thereafter, the Commission issued its Opinion No. 58 (R. 1060) which included certain findings of fact, conclusions of law, and a decision, and entered an order rejecting the plea of no jurisdiction and requiring Petitioner to comply with the aforesaid orders (R. 1073). Petitioner applied for a rehearing (R. 1080) which was granted (R. 1104), oral argument was had before the full Commission (R. 1116), and the Commission issued Opinion No. 58-A, reaffirming the find-

ings and conclusions of Opinion No. 58 (R. 1276). Petitioner's application for rehearing (R. 1284) was denied (R. 1290). A petition for review under Section 313(b) of the Federal Power Act (49 Stat. 860, 16 U. S. C. A., Sec. 825l), was filed with the United States Circuit Court of Appeals for the Second Circuit and on November 25, 1942, that Court promulgated an opinion affirming the orders of the Commission (R. 1293), and on February 2, 1943, entered its judgment pursuant to its opinion (R. 1320).

Statement of Jurisdiction.

The jurisdiction of this Court is invoked under Section 313(b) of the Federal Power Act (49 Stat. 860, 16 U. S. C. A., Sec. 825l), and Section 240 of the Judicial Code, as amended (43 Stat. 938, Sec. 1, 28 U. S. C. A., Sec. 347). The statute, the interpretation of which is involved, is the Federal Power Act (49 Stat. 847, 16 U. S. C. A. Sec. 791(a)). The judgment of the Circuit Court of Appeals was entered February 2, 1943, and this petition is filed within three months thereafter.

Questions Presented.

This case is a complementary companion to *Jersey Central Power and Light Co.* v. *Federal Power Commission,* No. 299, this Term, which has been reargued recently and is now under submission. That case concerned transmission; this case concerns generation. This case was repeatedly mentioned by name during the oral argument in that one. Together the two cases present a complete inquiry into the major features of the Federal Power Act.

The ultimate question presented in this case is whether Petitioner is a "public utility" within the meaning of the Federal Power Act. The subsidiary questions upon which that answer rests are:

1. What is the pattern of power drawn by Congress in the Federal Power Act?

2. Are the sales by Petitioner to The Connecticut Power Company sales in interstate commerce?

3. Is not Petitioner specifically excluded from Federal regulation by the negative clause in the second sentence of Section 201(b) of the Act?

4. Is Petitioner, being regulated in all its affairs by the State Commission of Connecticut, nevertheless a "public utility" within the complete definition of Section 201 of the Act?

A secondary question of procedure relates to the findings of fact by the Commission. The question is: Must not the Commission find the basic facts from which the ultimate facts are ascertained? Must it not find all facts uncontradicted on the record and material to the controversy?

Summary Statement of Facts.

Petitioner is a Connecticut corporation operating under a special act of the General Assembly (Ex. 1, R. 229), generating electric energy in Connecticut and distributing over local distribution lines wholly in Hartford County, Connecticut.

The Connecticut Power Company is another Connecticut corporation which distributes electric energy at retail in certain other townships in Connecticut, also under a special charter. Petitioner is obligated by contract to supply primary capacity to Connecticut Power to meet the base primary loads in six townships in the latter Company's territory, all in Connecticut (R. 273). There is no other contract or agreement between the two Companies.

The physical situation is that Connecticut Power owns and operates a substation on property adjacent to Petitioner's generating plant. Connecticut Power owns the conductors from the wall of the plant to the substation. Petitioner neither owns nor operates any facilities outside the walls of its generating plant (except its local distribution system) (R. 264, 265). In the substation are transformers, directing devices, etc. Two sets of lines, all belong-

ing to Connecticut Power Co. run from the substation, one to the local retail territory of Connecticut Power Co. in Connecticut, and the other north to the Massachusetts boundary.

The commercial situation is that Connecticut Power takes title to its energy at the bus bar inside the generating plant and conducts the energy to its substation over its own conductors outside the plant walls. From the substation some of the energy is directed by Connecticut Power Co. one way and some the other. At the time of delivery Petitioner has no knowledge of the destination of the energy, and no control whatsoever over that destination. Its part of the transaction is complete when it delivers the energy at the bus bar in the plant. Its obligation to deliver extends only to the specified basic loads of intra-Connecticut territory of the purchaser.

The energy delivered by Petitioner is not in a form in which interstate transmission is possible (R. 105). The Connecticut Power Company must transform such of the energy as it puts on its interstate line (R. 105, 134, 160, 184).

The Court below correctly found that, "Although in this way energy generated by Petitioner is transmitted and resold in Massachusetts, Petitioner never sells any designated block of energy for specific interstate use. Connecticut Power may either distribute a particular purchase to its customers or put it on the transmission line to Massachusetts. Petitioner has no interstate energy business except in so far as its sales of energy to Connecticut Power transmitted to Massachusetts may, as 'a matter of law' under the Act, constitute interstate transactions by Petitioner." (R. 1299).

Petitioner knows as a fact that Connecticut Power does send to Massachusetts some of the energy purchased from it.

The transactions are thus: Petitioner's contract obligation to Connecticut Power is for firm capacity of 22,500

K.W., the base load of the six Connecticut townships. Suppose that in a given hour the six townships are consuming at the rate of 10,000 K.W. But Connecticut Power requests and receives from Petitioner in that hour at the rate of 12,000 K.W. Petitioner does not know, and as a matter of practice does not inquire so long as it has the requested amount available, whether the intra-Connecticut needs of its purchaser are being exceeded. Connecticut Power on its part, however, sends 10,000 K.W.H. out of its substation to its Connecticut townships and transforms the other 2,000 K.W.H. and puts it on its lines to Massachusetts. By reason of the terms of its contract Petitioner could require that Connecticut Power limit its requests to its needs for intra-Connecticut customers, no matter how far below the contract maximum that need may be at the moment; and upon occasion it does so require. But if, as and when its generation at the moment is sufficient to meet the request of the purchaser, Petitioner pays no attention to the matter of ultimate destination.

Petitioner owns 9.19 per cent of the common stock of The Connecticut Power Company. Four of the eleven directors of Petitioner are among the fourteen directors of The Connecticut Power Company, and two of the principal officers of the two Companies are the same.

Petitioner's operations, facilities, rates and contracts, including all the above-mentioned wholesale contracts, are wholly subject to the jurisdiction of the Public Utilities Commission of the State of Connecticut (R. 195, *et seq.*)

Statutory Definition.

The provisions of the Federal Power Act (49 Stat. 847-8, 16 U. S. C. A., 824) defining the term "public utility" are printed hereinafter on page 32 in a manner so that the page can be unfolded and the statute viewed by the Court throughout the reading of the brief.

Reasons for Granting the Writ of Certiorari.

1. The Circuit Court of Appeals has decided a question of national importance, involving the construction of a Federal statute, which decision should be reviewed by this Court.

2. The decision of the Court below was in conflict with decisions of this Court, particularly the decision and opinion in *Superior Oil Co.* v. *Mississippi*, 280 U. S. 389; and in *Utah Power and Light Company* v. *Pfost*, 286 U. S. 165.

3. The case involves important questions not heretofore presented to the Court as to the construction of the Federal Power Act.

4. The decision of the Court below is not tenable under Article I, Section 8, or the Tenth Amendment to the Constitution.

5. All reasons which impelled the Court to grant certiorari in *Jersey Central Power and Light Co.* v. *Federal Power Commission, supra*, likewise apply to this case.

Conclusion.

Wherefore, petitioner, The Hartford Electric Light Company, prays that a writ of certiorari be issued out of and under the seal of this Court, directed to the United States Circuit Court of Appeals for the Second Circuit, commanding that Court to certify and send to this Court a full and complete transcript of the record of proceedings of said Circuit Court of Appeals for the Second Circuit in this case, numbered and entitled on its docket as No. 18036, *The Hartford Electric Light Company* v. *Federal Power Commission*, to the end that this case may be reviewed and determined by this Court as provided by the statutes of the United States; and that the judgment of said Circuit Court of Appeals for the Second Circuit herein

be reversed by this Court; and for such other relief as to this Court may seem proper.

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THE HARTFORD ELECTRIC LIGHT COMPANY, *Petitioner,*

v.

FEDERAL POWER COMMISSION, *Respondent.*

BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI.

Reference to Opinions Below.

The opinions and orders of the Federal Power Commission are reported at 37 P. U. R. (N. S.) 193 and 44 P. U. R. (N. S.) 515, and appear at R. 1060 and 1276. The opinion of the Circuit Court of Appeals for the Second Circuit is reported at 131 F(2d) 953, and appears at R. 1293.

Statement of Jurisdiction.

The Federal Power Commission, by an order entered February 25, 1941, (R. 1073) required the Petitioner to comply with Order No. 42 and other orders relating to "public utilities" within the meaning of the Federal Power Act, and to file data required by Electric Plant Accounts Instruction 2-D of the Uniform System of Accounts of the Commission; and by an order dated October 21, 1941, (R. 1282) reaffirmed the order of February 25, 1941. The United States Circuit Court of Appeals for the Second Cir-

cuit affirmed this determination (R. 1320). The petition for writ of certiorari herein is filed in accordance with the provisions of Section 313(b) of the Federal Power Act (49 Stat. 860, 16 U. S. C. A. Sec. 8251) and Section 240 of the Judicial Code, as amended (43 Stat. 938, Sec. 1, 28 U. S. C. A. Sec. 347). The judgment of the Circuit Court of Appeals was entered February 2, 1943, and the petition herein was filed in this Court within three months thereafter.

Statement of the Case.

The nature of the proceedings below and a statement of the facts therein are contained in the petition for writ of certiorari hereinabove printed.

Specification of Errors.

1. The Court below erred in holding that The Hartford Electric Light Company is a "public utility" within the meaning of the Federal Power Act.

2. The Court below erred in holding that the sales of electric energy by Hartford to The Connecticut Power Company are sales in interstate commerce.

3. The Court below erred in failing to hold that since the only facilities of Hartford are used for generation and for local distribution, Hartford is specifically excluded from the jurisdiction of the Federal Power Commission by the second sentence of Section 201(b) of the Federal Power Act. It erred in holding that the corporate organization, contracts, accounts, memoranda, papers and other records of Hartford are "facilities" within the meaning of Section 201 of the Federal Power Act, and in holding that any of the facilities of Hartford are for interstate transmission or sale.

4. The Court below erred in holding Hartford to be a "public utility" within the meaning of the Act even though all its affairs are regulated by the State of Connecticut.

5. The Court below erred in holding that the Commission need make no findings of uncontested facts material to the controversy "based on legal criteria which (it) deem(s) fallacious and which (it) rejected."

Summary of Argument.

The Federal Power Act is a narrow statute conferring a restricted jurisdiction upon the Federal Power Commission, intended to stop an existing gap in regulatory authority over electric utility companies. This meaning is proven by changes knowingly made by the Congress transforming an original bill of broad scope presented to it by the Federal Power Commission into a final enactment of exceedingly limited scope, by the statements of the Chairmen of the Congressional Committees in charge of the matter, by the declaration of policy in the statute and by the striking peculiarities of the specific terms of the statute.

Since the only facilities of Petitioner are used for generation and for local distribution, Petitioner is specifically excluded from Federal regulation by the second sentence of Section 201(b) of the Federal Power Act. The word "facilities" in the statute does not include intangibles such as corporate organization or incidental tangibles such as books and records.

A sale between domestic corporations, wholly consummated within a State, the vendor being without knowledge of or control over the ultimate destination of the article sold, and the vendee being free to resell within the State or to ship interstate, is not a sale in interstate commerce such as to subject the vendor to Federal regulation, merely by reason of the fact that the vendor knows, however accurately, that the vendee does transmit part of the purchased product interstate. The Act does not subject to federal regulation any transaction over which, absent the Act, the States have regulatory power.

The Federal Power Commission, an administrative agency, is required to find the basic facts upon which a con-

troversy depends, and may not confine its findings to ultimate facts sufficient to support its own legal theory of the answer to the controversy.

ARGUMENT.

I.

The Statutory Pattern of Power.

The basic problem is to discover the pattern of regulatory power delineated by Congress in the Federal Power Act. We discover it from the history of the Act and from its terms.

The impetus for the enactment was the decision of this Court in *Public Utilities Commission of Rhode Island* v. *Attleboro Steam & Electric Company*, 273 U. S. 83, by which a gap in the regulatory authority over electric utilities was revealed.

The first draft of a bill was presented to Congress by representatives of the Federal Power Commission. They assured the Congress that the bill was to stop the gap made plain by the *Attleboro* case. But the State Commissions protested that the text went further than the declared objective. We have printed on page 30 of this brief, Section 201, the jurisdictional section, of the bill as it was originally presented to Congress, on page 31 the bill as it was passed by the Senate, and on page 32 (unfolded) the Act as finally adopted. A comparative reading of these texts shows the following changes pertinent to the present inquiry.

1. The bill as presented by the Power Commission would have placed under Federal jurisdiction "the production of energy for such (*i.e.*, interstate) transmission and sale". That provision was stricken out and a provision was inserted specifically *excepting* facilities used for generation. (201(b).)

2. The bill proposed by the Commission would have placed under Federal jurisdiction "all facilities connected

therewith as parts of a system of power transmission situated in more than one State". That provision was stricken out by Congress:

3. The proposed bill would have placed under Federal jurisdiction "every person who controls, directly or indirectly", a person otherwise subject to Federal jurisdiction. That provision was stricken from the final Act.

4. Congress inserted in the final Act a provision not in the original bill, that Federal regulation should "extend only to those matters which are not subject to regulation by the States"; and a limitation that federal jurisdiction should extend only to the "business" of transmitting, etc.

In short, the Commission proposed to the Congress a sweeping scheme of Federal regulation. It would have subjected to its control generation for interstate sale or transmission, all facilities connected with interstate facilities, and all persons who directly or indirectly control a person engaged in interstate transactions. Congress rejected the proposal. Perhaps anticipating some degree of persistence on the part of the Commission in its views, Congress not only struck the broad clauses, but asserted in clear language that the jurisdiction conferred by the Act should not extend to matters over which the States had power, and with equal clarity it excluded facilities used for generation or for local distribution.

The Commission in this case, and before this Court in the *Jersey Central* case, *supra,* is urging precisely the same views which it originally presented to the Congress and which were there emphatically rejected. The Commission is merely asking the Court to reinsert in the statute provisions which Congress knowingly struck from it, and to delete provisions which Congress intentionally inserted.

This Court is familiar with the Committee Reports and statements of the Chairmen of the Committees.

The structure of the Act as finally approved indicates its meaning. Section 201 is the jurisdictional statement. It

declares the policy and defines "public utility". The other sections thereafter relate to "public utilities". For example, the much-discussed Sections 203, 204 and 301 all provide for the regulation of "public utilities" and "licensees", and of no other person. In some sections, Congress gave the Commission only certain concurrent jurisdiction over "public utilities", and in such instances carefully spelled out the bounds of its action, lest otherwise the Federal assumption of authority over the defined persons be deemed completely exclusive. The definition of "public utility" is the key to the whole Act.

We ask the Court to refer again to Section 201 of the Act, on page 32 of this brief, unfolded for convenience. Paragraph (e) defines a "public utility" and premises its definition upon "facilities subject to the jurisdiction of the Commission". The second sentence of paragraph (b) describes the facilities subject to that jurisdiction.

As we read these sentences of the statute, we are at once struck by two unusual features. A "public utility" is not a person who sells in interstate commerce, or who transmits in interstate commerce. It is a person who owns or operates *facilities for* such sale or transmission. Is there a difference? Clearly there is. A person might sell or transmit in interstate commerce as an incidental or collateral matter, using no facilities at all for the purpose or using facilities which are really owned and operated for some other purpose. We keep this peculiarity of the statutory definition in mind as we examine the other features of this Section 201.

We look at the second sentence of paragraph (b). If the facilities are for interstate sale or transmission, Federal authority attaches. But if the facilities are used for generation or local distribution, they are excluded from Federal power. This latter clause is carefully phrased and its words are meaningful. Will the Court carefully note the use and placement of the word "only" in this sentence of the statute? If facilities are used for generation, they are excluded. If they are used for local distribution, they are

excluded. But—and here is the point to be noted—if they are used "*only*" for intrastate transmission, they are to be excluded. It would appear that if they are used at all for generation or local distribution, they are excluded, but transmission facilities are excluded only if they are used *wholly* for intrastate business. We keep this peculiarity in mind as we proceed further with our examination of the section.

We turn now to paragraph (a), because, since it is the declaration of policy, it should shed light upon the meaning of the definitive provisions if the latter be doubtful. Three features of paragraph (a) are noteworthy. It declares "the business" of sale and transmission in interstate commerce to be in need of Federal regulation—not mere acts of sale or transmission, not incidental activity, not collateral transactions, but "the business". Next, it relates to transmission and sale *in* interstate commerce—not affecting, or causing, or resulting in, but only "in". Then it carries the much-discussed last three lines limiting this newly-exercised authority "to those matters which are not subject to regulation by the States". *All three of these characteristics are restrictive.* They are not expansive. They are narrow, not broad. They are striking by contrast to many other statutes passed about the same time, in which Congress entered upon regulation of broad scope in other fields.

Questions immediately arise in anyone's mind: Can it be that Congress refrained from asserting so evident a power as its power to control a company generating for interstate use, or facilities used in part for interstate purposes? Would such a plan of enactment achieve an even, uniform regulation of all electric companies? Would not the statute so construed prevent complete Federal regulation? The answers are as easy as the questions. Congress deliberately, intentionally, and expressly did not assert in this Act the full measure of its Constitutional power, but on the contrary affirmatively refrained from asserting more

than the minimum of power necessary to close the then-existing gap in regulation. Congress was not attempting regulation, uniform or otherwise, of all electric companies. It was not attempting but was consciously preventing complete Federal control.

Such was its declared purpose, such is the only possible meaning of its actions in respect to the bill originally presented to it, and such is the clear meaning of the precise terms of the Act. Production of electric energy is subject to State authority even if the energy produced moves directly into interstate commerce. *Utah Power & Light Company* v. *Pfost, supra.* For that reason, Congress excepted from Federal jurisdiction "facilities used for generation". For the same reason, it excepted "facilities used for local distribution". For the same reason, it struck from the original bill the provisions in regard to generation for interstate sale, interconnected facilities and controlled persons. As to each of these, State power of control exists.

If permitted to fit together, without straining or squeezing, all these indices of the meaning of this statute point to a complete, perfectly proportioned instrument for establishing Federal regulatory authority where State power does not exist. Any other reading, any attempt to fit the terms of the Act to another purpose, or to reconcile any other purpose with the Congressional history, is strained, unnatural and contradictory. We respectfully insist that no coherent or satisfactory reading of this statute can possibly be made if it be assumed that Congress was trying to accomplish an objective in any respect similar to the objectives it sought in the Labor Relations Act, or the Wage Standards Act or the others similarly familiar. The statute simply does not fit such purpose at any point

It is important, we respectfully urge, that it be kept in mind that Congress itself wrote this statute. It did not accept the proposals of the Executive branch of the Government. It rewrote in its own Committees the bill offered by the administrative Commission. What we are endeavor-

ing to ascertain is the *Congressional* intent, not the Executive intent. It is plain to every reader of the Commission's claims in this and in the *Jersey Central* case that the Commission is now asserting what has been its intent from the beginning, quite regardless of the fact that Congress rejected those proposals, and declined to attempt those objectives. The Commission argues for Federal control of facilities interconnected with interstate facilities. It argues for control over generating facilities if the product eventually reaches interstate movement; and similarly throughout its entire presentation. Those were intentions of the Commission upon offering the original bill, but they were not within the Congressional intent in enacting the Act. The contest here is precisely what it was before the Congressional Committees. Surely the statute must be read in the light of Congressional intent, and its phrases must be given natural meanings.

We submit that the pattern of power designed by Congress in this field, revealed by the legislative history, the declaration of policy in the Act, and by the terms of the Act in detail, was that Federal jurisdiction should not attach where State power existed. Congress meant to stop a very narrow gap. It did not mean to create a vast Federal organization to take over a great majority of the functions theretofore exercised by the States.

II.

Sales.

The Court below held that Petitioner "cannot possibly lack knowledge of the fact that the sales by it to Connecticut Power are indispensable to those Exchange arrangements which culminate in the transmission to, and sale of, considerable quantities of electric energy in Massachusetts", and "is fully aware that some energy is unavoidably destined by the buyer for interstate use" (R. 1305). Upon the basis of that knowledge on the part of Petitioner the Court

held it to be engaged "in" interstate commerce. Analysis will show that the whole of the Court's decision rested upon that premise; because if the sales were not in interstate commerce, the facilities were not for interstate commerce, and so Petitioner was not a "public utility".

The view of the Court is in conflict with decisions of this Court, particularly *Superior Oil Co.* v. *Mississippi, supra,* and *Utah Power & Light Company* v. *Pfost, supra.*

The scope of the doctrine announced below is tremendous. A grower of cotton in Alabama who knows that at least a portion of his product is indispensable to transactions in interstate commerce on the part of some one of the chain of subsequent owners, and knows that some part of his product is unavoidably destined by the buyer for interstate use, would be engaged in interstate commerce as he grows his cotton. The whole structure of Federal-State relationship, as built upon decisions of this Court, would totter, if not topple, if this view be now adopted. Without developing the point in this brief, such distinctions as that made by this Court in *Mulford* v. *Smith,* 307 U. S. 38, between *Currin* v. *Wallace,* 306 U. S. 1, and *Townsend* v. *Yeomans,* 301 U. S. 441, would disappear. The doctrine of *Oliver Iron Mining Company* v. *Lord,* 262 U. S. 172, and of *Coverdale* v. *Arkansas-Louisiana Pipe Line Company,* 303 U. S. 604, would likewise be destroyed. And the cases already mentioned, *Superior Oil* and *Utah Power and Light* would be reversed. The cases and situations which would be affected are too numerous to mention.

We know of no authority which holds that a State may not regulate a sale consummated wholly within a State in which the buyer, without control by the vendor, is free to, and does, thereafter ship across the State line. We understood Assistant Attorney General Shea to concede in the reargument of the *Jersey Central* case, that in the absence of Federal legislation, the State could regulate such sales. It necessarily follows that if the present statute be interpreted as establishing Federal jurisdiction over those sales,

it has impinged to that extent upon State authority. Such impingement is clearly contrary to both the intent and the terms of this statute.

The Court below relied upon the *Kalem* case (*Kalem Co.* v. *Harper Bros.*, 222 U. S. 62). The Court fell into an incidental inadvertence in its reference to that case, its quotation being a reference to *Graves* v. *Johnson*, 156 Mass. 211, and 179 Mass. 53, and not a reference to the facts in the *Kalem* case. It is quite clear that the *Kalem* case is in no way similar to the present one, because in that case the defendant "not only expected but invoked by advertisement" the action which gave rise to plaintiff's claim. In *Graves* v. *Johnson*, *supra*, an agent of the Massachusetts vendor visited the vendee in Maine, a dry state, and took the orders for the purchase in that State. The Supreme Court of Massachusetts held the sale legal even though the vendor knew the vendee's intention to effect a subsequent illegal resale in Maine, holding that the vendor's knowledge of the illegal purpose was indifferent. The Court also relied upon *Louisville and Nashville R. R. Co.* v. *Parker*, 242 U. S. 13, in which the question was whether the deceased was moving an empty car for the purpose of reaching an interstate car. Much closer to the point in the pending case is *Dept. of Treasury of Indiana, et al.* v. *The Wood Preserving Company*, 313 U. S. 62.

The Court below relied upon *People's Natural Gas Co.* v. *Federal Power Commission*, 127 F. (2d) 153, but that case involved a sale across state lines, just as the *Attleboro* case did, the only difference being that delivery was on the near side of, instead of at, the state line.

Furthermore, the clear intent of the Federal Power Act would be nullified if the view of the Court below be adopted. The knowledge which Petitioner possessed could have been gleaned by anyone from casual conversations, from public reports, from trade journals, and even from Government publications. Every generator of electric energy is familiar with the system connections of his purchasers. If mere

knowledge, however accurate, be sufficient to place one in interstate commerce, few indeed are not included. The statute was not drawn to be so broad.

The essence of Petitioner's contention on this point may be stated as follows:

On the basis of the facts in this record, could Petitioner successfully evade the jurisdiction of the Connecticut Commission over its sales to the Connecticut Power Company on the ground that they were sales in interstate commerce? We submit that no court would deprive the Connecticut Commission of jurisdiction over these sales.

III.

Facilities.

Petitioner neither owns nor operates any property except its generating plant and its local distribution system. The second clause of the second sentence of Section 201(b) provides:

> "The Commission * * * shall not have jurisdiction except as specifically provided in this Part and the Part next following, over facilities used for the generation of electric energy or over facilities used in local distribution * * *."

(The specific provisions in this Part and the Part next following relate to wars, emergencies, etc., and have no part in the pending problem.)

We submit that the language is quite clear. It was meant to preserve to local control operations which have always been so controlled. "As local as the generation of electrical power" is a figure of speech used by this Court (*Coverdale v. Arkansas-Louisiana Pipe Line Company*, 303 U. S. 604) to express locality beyond question. The statute is clear and the intent is clear.

The Court below correctly felt that to be a "public utility" a company must own or operate facilities for interstate sale or facilities for interstate transmission. At once

apparent is the difficulty of bringing this Petitioner within the limited class thus defined. Because it is a simple physical fact, insusceptible of contradiction, that Petitioner owns and operates no property whatever beyond what is used in its generation and its local distribution. The Court below reasoned, however, that where there is a sale in interstate commerce there must be a facility for such sale, and therefore, since it had already held Petitioner's sales to be sales in interstate commerce, Petitioner must have facilities for such sales. The problem was: Where? The Court found two possibilities.

First, it held that if generating facilities are aids to interstate sales, they thereby become facilities for such sales, and so within the Federal authority. Of course, that suggestion is untenable upon the language of the statute, and the Court quite frankly said that the negative clause must be interpreted "as if it read" differently from the way it does read. But the statute is quite simple. It says, "The Commission shall not have jurisdiction over facilities used for generation." Language could hardly be more clear. There is no additional proviso reading "unless they are aids to interstate sales". Not only so, but a phrase to that effect—"production of energy for such sales"—was stricken by Congress from the bill originally proposed. And since generation even for interstate sale has always been held subject to State regulation (*Utah Power & Light Company* v. *Pfost, supra*) the Court's interpretation runs precisely counter to the last clause of Section 201(a). But the Court waves this latter clause aside as too general, and says that Congress could not have intended that transactions covered by the *Attleboro* case should be exempt from Federal regulation merely because they are carried on by facilities also used for intrastate commerce. Here is a misconception of the *Attleboro* case and this case. In the former there was a sale across State lines and transmission up to the State line. Petitioner here does neither. To be sure, The Connecticut Power Company furnishes electric energy across the State line and

it has not been denied that its transmission activity subjects it to federal regulation. But we are not here concerned with Connecticut Power. Even so, a more complete study (R. 1197) than is possible in this brief would show that the Exchange operations of that Company are to be *encouraged*, not *controlled*, by the Commission under Section 202(a) of the statute, and those "encouraged" under that Section do not thereby become "public utilities".

This confusion of the Court below in regard to the *Attleboro* case and the intent and meaning of this statute arises in part because the Court attempts to treat a transaction in electric energy from generation to consumption as though it were one and inseparable. In fact the Commission in its opinions acknowledged this to be a necessary premise in its position. But this Court, and this statute, have treated electric energy by the rules applicable to commodities. A complete transaction in electric energy has four separate parts, generation, transmission, distribution and consumption. Generation has always been subject to State regulation, even though the energy moved forthwith across the State line. *Utah Power and Light* v. *Pfost, supra,* settled that question. Similarly, distribution has always been held to be subject to State control even though the product came directly off interstate lines. *So. Car. Power Co.* v. *S. C. Tax Com.*, 52 F. (2d) 515; 60 F. (2d) 528; 286 U. S. 525.

Congress was not, in the Federal Power Act, attempting to impose Federal control over the whole series of events which transpire when generation is in one State and consumption in another. It was trying only to regulate those transactions which lay beyond State authority. Reasoning from that intent it is easy to see why facilities used for generation and facilities used in local distribution were excluded from Federal jurisdiction.

In order to derive any except the foregoing meaning from the statute, Congress must be credited with extremely inept draftsmanship. So long as the various statements of pur-

pose made by Committee Chairmen and in the Act itself are given full face value the draftsmanship appears competent and accurate. For example, we notice the three expressions, "for", "used for" and "used only for" in the second sentence of 201(b). The word "for" carries an element of intent or design; "used for" is entirely factual; "used only for" is exclusive. These are the ordinary meanings of the words. The statute says that if facilities are "for" interstate sale they are included, but if "used for" generation or "used only for" intrastate transmission they are excluded. Read with the ordinary meanings of the words used, the clause reflects the intent expressed by the Congressional Committees and is consistent with the declaration in 201(a). Any other reading requires violence to the precise text, as the opinion of the Court below clearly shows.

Thus the effort to construe generation facilities as facilities for sales, even if the energy passes forthwith into interstate commerce, leads into a series of errors. By specification they are: (a) Refusal to accept the declared intent of Congress, (b) misconception of the *Attleboro* case, (c) failure to apply to electric energy the rules applicable to commodities, (d) failure to follow *Utah Power & Light Company* v. *Pfost*, (e) refusal to read the words of the statute in their clear and natural meaning.

The second possibility suggested by the Court is that Petitioner's corporate organization, contracts, records, books and accounts are facilities for interstate sales. In the first place, there is nothing in the record in this case to show that Petitioner has any records, books, contracts or papers for interstate transactions. Every such book, paper, or contract of which mention appears is for local distribution or generation uses. In fact, so far as the record shows, the Petitioner's accounts do not even contain information about any interstate transactions. All such information in the record came from the accounts, etc., of The Connecticut Power Company. There is nothing to show that Petitioner could ascertain from its own records, etc., anything about

interstate transactions. Certainly nothing appears which would support an assumption that Petitioner has any such facilities for interstate sales.

As a matter of lexicology, the word "facilities" does not customarily include books, etc. Webster defines the word thus: "A thing that promotes the ease of any action, operation, transaction, or course of action". Thus defined the word does not include corporate organization, which is not a thing, or books and records, which do not promote the ease of the transaction but merely record its occurrence. These transactions would be the same if there were no books, records or papers in respect to them. In Words and Phrases many references to uses of the word are given, but none referring to such things as books of account, etc. In *Borough of Swarthmore* v. *P. S. C.*, 277 Pa. 472, 121 A. 488, 489, the word was held not to include a contract. In the Interstate Commerce Act the word refers to switches, spurs, tracks, terminals, locomotives, cars, etc. (49 U. S. C., Sec. 1.(3)). "Facilities" in the revenue acts is held to refer to "tangible things", such as generators, pumps, houses, wiring, etc. *Briggs Mfg. Co.* v. *U. S.*, 30 F. (2d) 962.

But the chief reply to this part of the opinion of the Court lies in the fact that it would change the whole meaning and effect of the statute. The definition of Federal jurisdiction plainly rests upon "facilities for" transmission or sale, and strikingly does not rest upon transmission or sale alone. But if it be assumed, without proof, that there is a record of every sale, and if it be then held that such record is a facility for sale within the meaning of the statute, the limiting effect of the statutory provision is wiped out. The whole meaning is changed. The statutory reference to the "business", the specific exclusion of facilities used for generation or local distribution, all disappear from the statute if such meaning be given the word "facilities".

The fact is that even if there be an interstate sale, there need not necessarily be a facility for such sale. Direct sales, on the premises, by manufacturers or farmers are fre-

quently without "facilities" for sales purposes. There are, of course, many articles which are clearly facilities for sales; for example, counters, scales, measuring devices, etc. The present record is conclusive that Petitioner owns and operates no such facilities for interstate sales.

We come back to the intent of Congress. The Court below held that Congress meant to impose Federal control upon all phases of transactions in electric energy from generation to consumption whenever the two occur in different States. We think Congress in this statute was doing the same sort of thing which this Court made clear in the three tobacco cases, *Mulford* v. *Smith, supra, Currin* v. *Wallace, supra,* and *Townsend* v. *Yeomans, supra.* In the tobacco situation there was a Federal statute which regulated sales in interstate commerce and facilities for such sales, and a State statute which regulated the production and the producer of the tobacco. The Court had no difficulty in holding both statutes valid, saying that the Federal statute regulating sales did not purport to regulate production. But that production was in aid of those sales just as certainly as the generation in this case is in aid of these sales. And to pursue an accurate analogy further, suppose that instead of selling his tobacco at an auction warehouse (clearly a "facility for sale"), the producer had simply walked out into the field with the purchaser, and said, "There it is. Haul it away." There would have been no "facility for sale" involved. The plan of Congress in that situation is clear. It placed under Federal supervision the facilities for interstate sales, but it left to State control the production of tobacco, even production for those very interstate sales. It did the same here. Petitioner has no facilities for interstate sales.

IV.

State Regulation.

Special Counsel for the Public Utilities Commission of Connecticut appeared under subpoena as a witness and testified (R. 195 *et seq.*) that all of Petitioner's rates and contracts with Connecticut Power have been filed in past years with that Commission, that the Commission has jurisdiction over these matters, that Petitioner has never made any claim to the contrary, and that Petitioner has no power under its charter to engage in interstate commerce. Under decisions of this Court, Petitioner is subject to regulatory control by the State. See particularly *Utah Power & Light Company* v. *Pfost, supra.*

Under the clear language of the last clause of Section 201(a) of the statute, Petitioner is not included within the jurisdiction of the Federal Commission. The Court below paid no attention to this phase of the case, giving it merely a passing reference.

V.

Findings.

The Commission made no findings of fact descriptive of the physical properties of Petitioner, or its facilities, or its operations, contracts or transactions, or as to the disposition of energy by The Connecticut Power Company, or as to the regulation of Petitioner by the State of Connecticut. All these facts were material to the controversy and all were proven without contradiction on the record. They were the basic facts upon which the ultimate conclusions must rest.

Upon authority of *Saginaw Broadcasting Co.* v. *Federal Communications Commission*, 96 F(2d) 554, 559-564; cert. denied, 305 U. S. 613, we submit that failure to find the basic facts material to the controversy is reversible error.

This point is so important in the field of administrative law as alone to justify the granting of the writ of cer-

tiorari. If an administrative agency can decline to make any findings of fact based upon legal criteria which it rejects, then both respondents before the Commission and the Courts upon review of them, are helpless.

Conclusion.

This Court said in the *Utah Power and Light case*, *supra*, that the rules relating to interstate commerce in commodities must be applied to electric energy. That being so, the pending case is simply this: A manufacturer of cotton cloth in Alabama sells his product at his counter inside his factory. A purchaser comes into the factory, buys cloth at the counter, takes it as far as the door on a floor truck belonging to the factory, puts the cloth into his own truck and conveys it to his place of business. Thereafter he sells some of the cloth in Alabama and makes some of it up into shirts which he ships to a store in Boston. The latter fact is known definitely to the manufacturer from whom he bought the cloth, because the two men are brothers-in-law. The question in the case is: Would the entire business of the manufacturer of the cloth be subject to Federal regulation under a statute such as the Federal Power Act? The simple answer is that at the very most the manufacturer is causing or affecting or making possible interstate commerce, and Congress struck from the proposed bill a clause placing Federal control over production for interstate use.

The Court below erred in the following phases of its opinion:

It refused to treat electric energy as a commodity. It held these sales to be identical with those in the *Attleboro* case. It relied upon *Peoples Natural Gas Co.* v. *Federal Power Commission*, *supra*, and upon the *Kalem* case, *supra*. It held knowledge on the part of a manufacturer that part of his goods are "unavoidably destined by the buyer for interstate use" to be sufficient to put the manufacturer in interstate commerce. It ignored the in-

tent of Congress. It misconstrued Section 201(b). It gave no effect to Section 201(a). It ignored the word "business" in the statute. It paid no attention to the existing complete control of Petitioner by the State Commission of Connecticut.

The writ should be granted.

Respectfully submitted,

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APPENDIX.

Section 208 of Federal Power Act.

[49 Stat. 853; 16 USC A§ 824g]

SEC. 208. (a) The Commission may investigate and ascertain the actual legitimate cost of the property of every public utility, the depreciation therein, and, when found necessary for rate-making purposes, other facts which bear on the determination of such cost or depreciation, and the fair value of such property.

(b) Every public utility upon request shall file with the Commission an inventory of all or any part of its property and a statement of the original cost thereof, and shall keep the Commission informed regarding the cost of all additions, betterments, extensions, and new construction.

Section 301(a) of Federal Power Act.

[49 Stat. 854; 16 USCA § 825]

SECTION 301. (a) Every licensee and public utility shall make, keep, and preserve for such periods, such accounts, records of cost-accounting procedures, correspondence memoranda, papers, books, and other records as the Commission may by rules and regulations prescribe as necessary or appropriate for purposes of the administration of this Act, including accounts, records, and memoranda of the generation, transmission, distribution, delivery, or sale of electric energy, the furnishing of services or facilities in connection therewith, and receipts and expenditures with respect to any of the foregoing: *Provided, however,* That nothing in this Act shall relieve any public utility from keeping any accounts, memoranda, or records which such public utility may be required to keep by or under authority of the laws of any State. The Commission may prescribe a system of accounts to be kept by licensees and public utilities and may classify such licensees and public utilities and prescribe a system of accounts for each class. The Commission, after notice and opportunity for hearing, may determine by order the accounts in which particular outlays and receipts shall be entered, charged, or credited. The burden of proof to justify every accounting entry questioned by the Commission shall be on the person making, authorizing, or requiring such entry, and the Commission may suspend a charge or credit pending submission of satisfactory proof in support thereof.

Section 201 of S. 1725 as Originally Introduced in the Senate—Feb. 6, 1935 (Italics ours).

"SECTION 201. (a) The provisions of this title shall apply to the transmission and sale of electric energy in interstate commerce *and to the production of energy for such transmission and sale,* but shall not apply to the retail sale of energy in local distribution. The Commission shall have jurisdiction over all facilities for such transmission, sale, *and/or production of energy by any means and over all facilities connected therewith as parts of a system of power transmission situated in more than one State,* except facilities for the retail distribution of electric energy, or for the production or transmission of energy solely for the use of the producer or transmitter or the use of his tenants on property owned or controlled by him and not for resale. Every person who owns or operates facilities subject to the jurisdiction of the commission under this title and every person who controls, directly or indirectly, any such person shall be subject to the provisions of this title and title III. The term 'public utility' when used in this title and title III means any person who owns or operates such facilities.

"(b) Electric energy shall be held to be transmitted in interstate commerce if transmitted from a State to any point outside thereof; or between points within the same State but through any point outside thereof; or from or to any place in the United States to or from a foreign country; but only insofar as such transmission takes place within the United States.

Section 201 of S. 2796, being a substitute for S. 1725 as reported out, passed by Senate, and sent to House. (June 13th, 1935) (Italics ours).

SECTION 201. (a) It is hereby declared that the business of *generating*, transmitting, and selling electric energy for ultimate distribution to the public is affected with a public interest, and that Federal regulation of that *part of said business which consists of the transmission and sale of electric energy* in interstate commerce *and the generation of electric energy for such* transmission and sale is necessary in the public interest. It is *further declared to be the* policy of Congress to extend Federal regulation to those matters *which cannot be regulated by the States*, and also to exert Federal authority to strengthen and assist the States in the exercise of their regulatory powers and *not to impair or diminish the powers of any State commission.*

(b) The provisions of this part shall apply to the transmission of electric energy in interstate commerce, to the sale of electric energy at wholesale in interstate commerce and *to the production of electric energy for such transmission or sale*, but shall not apply to the retail sale of such energy in local distribution. The Commission shall have jurisdiction over all facilities for such *production*, transmission, or sale of electric energy *by any means and over all facilities connected therewith as parts of a system of power transmission situated in more than one State, except facilities used only for the production or transmission of electric energy in intrastate commerce or in local distribution* or for the use of the producer or transmitter. Every person who owns or operates facilities subject to the jurisdiction of the Commission under this part shall be subject to the provisions of this part and the part next following.

(c) Omitted—defines interstate.

(d) The term 'public utility' when used in this part or in the part next following means any person who owns or operates facilities subject to the jurisdiction of the Commission under this title.

(e) Omitted—refers to U. S. agencies.

(f) Electric energy shall be held to be sold at wholesale in interstate commerce within the meaning of this part only when it is sold for resale after its transmission in interstate commerce or before such transmission if the same is thereafter so transmitted.

(g) The provisions of this part shall apply only to the regulation of the transmission or sale in interstate commerce of electric energy.

Section 201 of Federal Power Act.

[49 Stat. 847; Title 16 USCA § 824.]

SECTION 201. (a) It is hereby declared that the business of transmitting and selling electric energy for ultimate distribution to the public is affected with a public interest, and that Federal regulation of matters relating to generation to the extent provided in this Part and the Part next following and of that part of such business which consists of the transmission of electric energy in interstate commerce and the sale of such energy at wholesale in interstate commerce is necessary in the public interest, such Federal regulation, however, to extend only to those matters which are not subject to regulation by the States.

(b) The provisions of this Part shall apply to the transmission of electric energy in interstate commerce and to the sale of electric energy at wholesale in interstate commerce, but shall not apply to any other sale of electric energy or deprive a State or State commission of its lawful authority now exercised over the exportation of hydroelectric energy which is transmitted across a State line. The Commission shall have jurisdiction over all facilities for such transmission or sale of electric energy, but shall not have jurisdiction except as specifically provided in this Part and the Part next following, over facilities used for the generation of electric energy or over facilities used in local distribution or only for the transmission of electric energy in intrastate commerce, or over facilities for the transmission of electric energy consumed wholly by the transmitter.

(c) For the purpose of this Part, electric energy shall be held to be transmitted in interstate commerce if transmitted from a State and consumed at any point outside thereof; but only insofar as such transmissnon takes place within the United States.

(d) The term "sale of electric energy at wholesale" when used in this Part means a sale of electric energy to any person for resale.

(e) The term "public utility" when used in this Part or in the Part next following means any person who owns or operates facilities subject to the jurisdiction of the Commission under this Part.

(f) Omitted—refers to U. S. agencies.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1942.

No. 831.

THE HARTFORD ELECTRIC LIGHT COMPANY, *Petitioner*,

v.

FEDERAL POWER COMMISSION, *Respondent*.

BRIEF FILED ON BEHALF OF THE NATIONAL ASSOCIATION OF RAILROAD AND UTILITIES COMMISSIONERS, AS AMICUS CURIAE, IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI.

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April 10, 1943.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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OPINION BELOW.

Th opinion of the Circuit Court of Appeals for the Second Circuit is reported in 131 Fed. (2nd), page 953.

PRELIMINARY STATEMENT.

The National Association of Railroad and Utilities Commissioners is a voluntary Association embracing within its membership the members of the regulatory commissions and boards of the several States of the United States except two, one of which has no State regulatory commission.

By the constitution of the Association, the President of the Association, and the Executive Committee, or either of them, may direct the General Solicitor to appear on behalf of the Association (as distinguished from a particular commission represented in its membership) in any proceeding pending before any court or commission in which, in the judgment of such President or Committee, appearance on behalf of the Association should be made. Appearance is made herein on behalf of said Association by direction of the President and also of the Executive Committee of said Association, in the general public interest.

STATEMENT OF THE CASE.

This proceeding involves the validity of orders of the Federal Power Commission, hereinafter called Commission, dated February 25, 1941 and October 21, 1941, which directed Hartford Electric Light Company, hereinafter called Hartford, to comply with accounting orders of the Commission (R-1060, 1073, 1276). Hartford sought a review of these orders of the Commission by the United States Circuit Court of Appeals for the Second Circuit upon the ground that it was not subject to the jurisdiction of the Commission under the Federal Power Act. That Court affirmed the orders of the Commission in an opinion (R-1293), and entered judgment accordingly (R-1320).

SPECIFICATION OF ERROR.

The only error specified for argument herein is the following: The Court erred in holding that facilities of Hartford used only in the generation of electric energy, and in the sale thereof at the point of generation, constituted facilities within the jurisdiction of the Commission under Section 201(b) of the Federal Power Act, bringing Hartford within the definition of a public utility contained in Section 201(e) of said Act.

SUMMARY STATEMENT OF FACTS.

The facts of this case, so far as necessary to be stated for the purpose of this brief, are as follows:

Hartford is a Connecticut corporation, operating an electric generating plant in Hartford, Connecticut. It also distributes electric energy locally in and about Hartford, in that State. It likewise sells electric energy at wholesale to Connecticut Power Company, another Connecticut corporation, hereinafter called Connecticut. It sells no electric energy in interstate commerce, unless, as a matter of law, the sales to Connecticut constitute sales in interstate commerce.

Connecticut is a member of the Connecticut Valley Exchange, hereinafter called the Exchange. The Exchange consists of Massachusetts and Connecticut utilities, and is operated for the purpose of enabling members to exchange electric energy at incremental cost. Electric energy generated by Hartford, and sold by it to Connecticut, is, to a substantial extent, through such exchange transactions, transmitted into Massachusetts, and is there sold, by Massachusetts members of the Exchange, to Massachusetts consumers.

Aside from its facilities used only in local distribution, Hartford owns no facilities for generation or transmission outside its generating plant.

Energy sold by Hartford to Connecticut is delivered at the bushings on the wall of its generating plant. Connecticut owns the facilities between such point of delivery and a transformer substation located near the generating plant, which substation is also owned by Connecticut. From that substation, Connecticut directs the energy purchased from Hartford to the territory served by Connecticut, or makes the same available for use by the Exchange. Energy used by the Exchange is transmitted to the Massachusetts state line over a 66,000-volt transmission line, owned by Connecticut. Hartford generates at 11,000 volts and makes delivery to Connecticut at that voltage. Before energy can

be transmitted as far as the Massachusetts state line, however, it is necessary to transform the same, and this is done by Connecticut at its substation.

Prior to the enactment of Federal Power Act, Hartford was a member of the Exchange. It then owned this 66,000-volt line, the transformer substation, and the facilities between that substation and the generating plant. Prior to July 1, 1935, however, it ceased to be a member of the Exchange, and sold to Connecticut the 66,000-volt transmission line, the transformer substation, and all facilities between that station and the generating plant. Its purpose in withdrawing from the Exchange, and in making this sale, was to avoid being subject to the Federal Power Act.

Thereafter, Connecticut purchased energy from Hartford, and used a part of the same in its exchange transactions, in the manner hereinbefore stated. The movement of electric energy, in these exchange transactions, has been the same since such sale as it was prior thereto.

Hartford is under contract obligation to supply firm power up to a designated limit, required by Connecticut for its sales to intrastate customers. Although not obligated to do so, Hartford also sells to Connecticut its surplus energy, and it is this surplus energy which enables Connecticut to transmit energy into Massachusetts, under the exchange arrangement.

Hartford knows that Connecticut thus transmits into Massachusetts a part of the energy supplied by Hartford. As the Court below found, however, Hartford never sells any designated block of energy for specific interstate use. Connecticut may either distribute a particular purchase to its customers or put it on the transmission line to Massachusetts. Hartford has no interstate energy business except in so far as its sales of energy to Connecticut, transmitted to Massachusetts, may, "as a matter of law," under the act, constitute interstate transactions.

The Commission held that Hartford was a public utility, subject to the Federal Power Act, upon the following grounds:

(1) that "the facilities between the generators and the bushings on the wall of its generating plant" are facilities used in an interstate sale at wholesale, not excluded from the Commission's jurisdiction by Section 201(b), and (2) that the "corporate organization of Hartford, its contracts, its books of account, its instrumentalities for billing and collecting * * * are used in the sale of electric energy," and are thus subject to the Commission's jurisdiction.

REASONS FOR GRANTING THE WRIT

(1) This is the first case adjudicated by a court calling for a construction of those provisions of the Federal Power Act which relate to generating companies. The court below has erroneously construed these provisions in such fashion as to nullify the same. The decision should be reviewed for the purpose of correcting the error below, and establishing a proper construction for the government of all Federal Courts and of the Commission.

(2) Construction of the provisions of the Federal Power Act relating to generating companies is not called for in *Jersey Central Power and Light Company* v. *Federal Power Commission,* now pending before this Court. It is of national importance that the same be considered by this Court at this time, so that a comprehensive construction of those provisions which limit the jurisdiction of the Commission may be made, for the guidance of the Commission, of electric utilities which may be affected thereby, of State authorities, and of the Federal Courts of Appeal.

ARGUMENT.

A Generating Company Which Sells for Resale at the Point of Generation to an Electric Utility Which Transmits Energy So Sold in Interstate Commerce Is Not, by Reason of Such Sales, Subject to the Jurisdiction of the Federal Power Commission.

The Commission and the Court of Appeals recognize the crucial question in this case to be whether Hartford owns facilities subject to the jurisdiction of the Commission. They recognize further that decision of that question depends upon the construction of the provisions of Section 201(b) of the Federal Power Act.

The only transactions of Hartford which have any connection with electric energy which passes over a State line are the generation of such energy and its sale at the point of generation. For the purposes of this case, therefore, Hartford is a generating company pure and simple, selling at the point of generation.

Because the transmission of electric energy into Massachusetts, after its sale to Connecticut, is found by the Commission to be instantaneous, the Commission holds such sale by Hartford to be a sale in interstate commerce, and the plant facilities, the office paraphernalia and the corporate organization of Hartford to be facilities subject to the jurisdiction of the Commission. This holding the Commission bases upon the provision of Section 201(b) that the Commission "shall have jurisdiction over *all* facilities for transmission or sale of electric energy in interstate commerce". In other words, the Commission rules, in effect, that every sale for resale of electric energy which moves in interstate commerce, by whomsoever made, is within its jurisdiction under Section 201(b), and that ownership or operation of any facilities used in connection therewith brings the owner or operator within the definition of Section 201(e), as a "public utility". That ruling would bring under the Commission every generating company selling enery transmitted by a purchaser in interstate commerce.

The Court of Appeals (1) unanimously sustained the Commission's orders upon the ground that Hartford's "corporate organization, contracts, accounts, memoranda, papers and other records", in so far as utilized in connection with sales for resale in interstate commerce, are subject to the jurisdiction of the Commission under the Act, and, (2) a majority of the Court sustained the Commission upon the further ground that, even if Hartford "has nothing except facilities for generation, * * * generation facilities, where used as aids to such sales (for resale in interstate commerce) are within the Commission's jurisdiction under Section 201(b)."

There is thus presented the question whether a generating company which sells energy at the point of generation, with knowledge that the purchaser will transmit a part of the same in interstate commerce, is subject to the Act, notwithstanding the provisions of 201(b) of the Act excluding generating facilities from the jurisdiction of the Commission.

The Commission holds that the exclusion provisions do not apply because of the qualifying words in Section 201(b) "except as specifically provided in this Part and the Part next following." The Court of Appeals holds that the exclusion provisions do not apply, but reaches that conclusion by another process of reasoning.

Avoiding a decision upon the question of whether the facilities between the generator and the bushings on the wall are transmission facilities, the Court holds that they are facilities used for the sale of electric energy at wholesale in interstate commerce, and that jurisdiction is specifically granted to the Commission thereover by the opening words of the last sentence of Section 201(b), "The Commission shall have jurisdiction over all facilities for such transmission or sale of electric energy (at wholesale in interstate commerce)". The words following, the Court below holds, in no way limit that specific grant. Such following words, the Court says, should be read "as a negatively worded con-

firmation" of jurisdiction specifically granted in the Act, including the specific grant just quoted.

The purpose of all statutory construction is, or should be, to effectuate the legislative purpose. The construction which attributes to the concluding words of Section 201(b) no limiting effect, we submit, has been arrived at not by searching to discover the probable purpose of Congress, but, by adroit reasoning, to escape from any limitation upon the broad grant of jurisdiction in the opening words of Section 201(b).

Those words are: "The Commission shall have jurisdiction over all facilities for such transmission or sale of electric energy (at wholesale in interstate commerce)." This grant, however, is immediately followed by the words: "but shall not have jurisdiction, except as specifically provided in this Part and the Part next following, over facilities used for the generation of electric energy or over facilities used in local distribution or only for the transmission of electric energy in intrastate commerce, or over facilities for the transmission of electric energy consumed wholly by the transmitter."

To say that these words, just quoted, were not designed to limit the scope of the immediately preceding grant, is to refuse recognition to the obvious. Section 201 (b) is to be read in the light of the legislative history of the Act, and in the light of other related provisions of the Act. The declaration of policy and purpose contained in paragraph (a) of the same section is of especial significance. It is there declared "that the business of transmitting and selling electric energy for ultimate distribution to the public is affected with a public interest * * *". It was of that part of this business "which consists of the transmission of electric energy in interstate commerce and the sale of such energy at wholesale in interstate commerce" of which Congress declared regulation necessary in the public interest.

The intent was to regulate that part of that business, whether the transmission and sale should be by the owner of

the energy transmitted, or the transmission should be for the owner by another receiving compensation or a toll therefor.

This is the construction which was correctly placed upon applicable provisions of the Act by Assistant Attorney-General Shea, at the oral argument of the *Jersey Central Power and Light Company case* before this Court.

These wholesale transactions of transmission and sale, across State lines, when the Federal Power Act was enacted, had been declared by this Court to be beyond the reach of State power, as Congress understood the decision in *Attleboro Steam and Electric Company* v. *Public Utilities Commission,* 273 U. S. 83.

Congress intended to supply regulation only for that part of the business which the States could not regulate. In Section 201(a) it designated that part, and declared that Federal regulation was to extend "only to those matters which are not subject to regulation by the States." The purpose of the excluding words of 201(a), just quoted, was not to limit the regulatory power of the Commission as to matters concerning which jurisdiction was specifically granted, but was to indicate the purpose of Congress, as a guide to the Commission in the construction and administration of the Act. For example, as argued by Mr. Shea, at the Jersey Central Power and Light Company arguments, Congress designed to make clear its intent not to displace State power to regulate service and rates to consumers, even in cases where such service might be supplied across State lines.

The opinion below, as we have seen, avoids the effect of the limiting words of Section 201(b) by the simple expedient of saying that they are not limiting words, in so far as interstate facilities are concerned, but, on the contrary, are confirming words, or words which repeat a grant or grants otherwise specifically made. The opinion refers to the clause containing these limiting words as the "'but' clause." For convenience that designation is adopted for the discussion in this brief.

The opinion seeks to justify the construction which it places upon the "but" clause, by saying:

> "* * * among the facilities described in the 'but' clause are those used 'only for the transmission * * * in intrastate commerce'; as such facilities could not possibly be among those used for interstate transmission or interstate wholesale sales, the 'but' clause becomes foolish as carving out of the authority granted in the earlier part of the same sentence the facilities described in the 'but' clause. Such a foolish interpretation is avoided by (the construction adopted by the opinion)."

In commenting upon this argument to support the opinion, it may be observed that it would seem a not less "foolish construction" to hold that Congress having, in the second sentence of Section 201(b), conferred upon the Commission jurisdiction over all facilities for transmission or sale, in positive and specific language, considered it necessary, in that self-same sentence, to reiterate the grant to confirm to the Commission the jurisdiction there and elsewhere conferred, which, except for the "but" clause could not possibly have been brought into question, in construing the Act. So construed the "but" clause certainly approaches sufficiently near to the line of foolishness to invite some effort to find a more rational purpose for the clause. Such purpose is easily discoverable.

The "but" in the "but" clause was not in the bill when it was introduced in the Senate. It came in later in a manner to be indicated. The clause, however, was always an expression of the purpose of the Congress to narrow the application of the bill. A brief reference to the legislative history of the bill will demonstrate this fact, and will completely negative the idea that the clause was designed not to reduce but to confirm, in all its breadth, the grant of jurisdiction which the clause to which it is appended, standing alone, would have given.

The legislative history of the Act shows that the bill which became the Federal Power Act, as it was first intro-

duced in the two Houses of Congress, was drawn to include generating companies, that the purpose to include such companies was abandoned, and that one of the prime purposes of the "but" clause was to insure their exclusion from the jurisdiction which the bill did grant to the Commission.

The bill first presented was introduced in the Senate by Senator Wheeler as S. 1725, and in the House by Congressman Rayburn as H. R. 5423. In the bill as introduced, Section 201 read as follows:

> "SECTION 201. (a) The provisions of this title shall apply to the transmission and sale of electric energy in interstate commerce and to the production of energy for such transmission and sale, but shall not apply to the retail sale of energy in local distribution. The Commission shall have jurisdiction over all facilities for such transmission, sale, and/or production of energy by any means and over all facilities connected therewith as parts of a system of power transmission situated in more than one State, except facilities for the retail distribution of electric energy, or for the production or transmission of energy solely for the use of the producer or transmitter or the use of his tenants on property owned or controlled by him and not for resale. Every person who owns or operates facilities subject to the jurisdiction of the commission under this title and every person who controls, directly or indirectly, any such person shall be subject to the provisions of this title and title III. The term 'public utility' when used in this title and title III means any person who owns or operates such facilities.
>
> "(b) Electric energy shall be held to be transmitted in interstate commerce if transmitted from a State to any point outside thereof; or between points within the same State but through any point outside thereof; or from or to any place in the United States to or from a foreign country; but only insofar as such transmission takes place within the United States."

Committee hearings were held in each House. Objection was made to the broad sweep of the bill. The Senate Com-

mittee reported the bill in a new draft, as S. 2796. As reported and passed, Section 201 read as follows:

> "SECTION 201. (a) It is hereby declared that the business of generating, transmitting, and selling electric energy for ultimate distribution to the public is affected with a public interest, and that Federal regulation of that part of said business which consists of the transmission and sale of electric energy in interstate commerce and the generation of electric energy for such transmission and sale is necessary in the public interest. It is further declared to be the policy of Congress to extend Federal regulation to those matters which cannot be regulated by the States, and also to exert Federal authority to strengthen and assist the States in the exercise of their regulatory powers and not to impair or diminish the powers of any State commission.
>
> "(b) The provisions of this part shall apply to the transmission of electric energy in interstate commerce, to the sale of electric energy at wholesale in interstate commerce and to the production of electric energy for such transmission or sale, but shall not apply to the retail sale of such energy in local distribution. The Commission shall have jurisdiction over all facilities for such production, transmission, or sale of electric energy by any means and over all facilities connected therewith as parts of a system of power transmission situated in more than one State, except facilities used only for the production or transmission of electric energy in intrastate commerce or in local distribution or for the use of the producer or transmitter. Every person who owns or operates facilities subject to the jurisdiction of the Commission under this part shall be subject to the provisions of this part and the part next following."

It may be pointed out that the bill, when introduced, exhibited the peculiar grammatical structure which appears in Section 201(b) as enacted, in that a broad all-inclusive provision was limited and cut down by a "but" clause, as follows:

> "The provisions of this title shall apply to the transmission and sale of electric energy in interstate commerce and to the production of energy for such transmission and sale *but shall not apply to the retail sale of energy in local distribution.*"

This "but" clause was plainly designed to reduce the effect of the preceding sentence by excluding from the Commission's jurisdiction sales of electric energy to consumers. Also we point out that the next following sentence contained an "except" clause for a similar purpose of exclusion. These first two sentences, with some changes in phraseology, were carried into Section 201(b) of S. 2796, the "but" form being retained in the first sentence, and the "except" form in the next following sentence. Among the exceptions stated in the "except" clause in S. 2796 were "facilities used only for the production or transmission of electric energy in intrastate commerce or in local distribution." It was this "except" clause which finally became the "but" clause discussed in the opinion below.

We submit that it must be apparent that when the Senate passed the bill there was no more occasion for including such facilities in the "except" clause than there was for retaining them in that clause when it had become the "but" clause. The grant to which the exceptions were stated was a grant of "jurisdiction over all facilities for *such* production, transmission or sale", with the "such" relating back to "the transmission (and) * * * to the sale of electric energy at wholesale in interstate commerce", in the first sentence of the paragraph. It is obvious, just as the opinion below states, that "such facilities could not possibly be among those used for the interstate transmission or interstate wholesale sales"; *but it is just as obvious that in the bill as passed by the Senate they were named in the "except" clause with the design that they should be excluded from the Commission's jurisdiction.* Whether the phraseology was "foolish" or not, the purpose of the clause at that stage was not doubtful.

The House, having held hearings on H. R. 5423, redrafted S. 2796, and passed the same in a new form. Among other changes it determined to withhold from the Commission jurisdiction over the generating business. This court had held that generation was local, in *Utah Power and Light Company* v. *Pfost*, 286 U. S. 165; and, consistently with its design to preserve state jurisdiction to the fullest practicable extent, the House eliminated "generation" from the declaration of purpose in Section 201(a), and added "facilities used for the generation of electric energy" to those excluded from the Commission's jurisdiction by the second sentence in Section 201(b). As the bill passed the House, Section 201(b) read as follows:

> "(b) The provisions of this Part shall apply to the transmission of electric energy in interstate commerce and to the sale of electric energy at wholesale in interstate commerce, but shall not apply to any other sale of electric energy or deprive a State or State commission of its lawful authority now exercised over the exportation of hydroelectric energy which is transmitted across a State line. The Commission shall have jurisdiction over all facilities for such transmission or sale of electric energy, but shall not have jurisdiction over facilities used for generation of electric energy or over facilities used in local distribution or only for the transmission of electric energy in intrastate commerce, or over facilities for the transmission of electric energy consumed wholly by the transmitter."

In making the changes which it made, in Section 201(b), the House brought the first and second sentences into uniformity in grammatical structure by adopting the "but" form of exception for each. This change not only produced uniformity, but seemed to make the exclusion of the facilities specified more emphatic.

It is a striking example of the infirmity of the English language which contributes to the difficulty of securing the administration of law in conformity with the legislative will, that the very means which the Congress took to make emphatic its expression of purpose is now made the basis

of a judicial opinion which accomplishes the exact opposite of that purpose.

That the legislative purpose was one of exclusion is plain, not alone by reason of the original form of the bill, and the manner in which the changes were made, to which we have adverted. The purpose was explicitly stated by the House Committee in reporting S. 2796. In its report the Committee said:

> "Subsection (a) contains a declaration of policy, * * *. The inclusion of generation as carried in the Senate bill is omitted by your Committee.
>
> "Subsection (b) confers jurisdiction upon the Commission * * *. As in subsection (a), the provisions of the Senate bill relating to the production of electric energy for interstate transmission and facilities for such production are omitted."

These statements respecting generation had reference, of course, to those provisions of the bill which dealt with the production of electric energy contained in Section 201. There were other sections of the bill which gave to the Commission a certain limited jurisdiction as respects generation under certain circumstances.

When the bill went to conference between the two Houses, the second sentence of Section 201(b) was amended, so that such jurisdiction as was designed to be conferred by these other sections should not be affected. Section 201(b) took its final form, the second sentence being made to read as follows:

> "The Commission shall have jurisdiction over all facilities for such transmission or sale of electric energy, but shall not have jurisdiction, *except as specifically provided in this Part and the Part next following*, over facilities used for the generation of electric energy or over facilities used in local distribution or only for the transmission of electric energy in intrastate commerce, or over facilities for the transmission of electric energy consumed wholly by the transmitter." (Italics supplied)

The purpose of the inserted words, here italicized, was stated to the House by the House Conferees as follows:

> "The Senate bill in Section 201(a) contained a somewhat more lengthy declaration of policy than the House Amendment, the only material difference being that the House Amendment contained no reference to 'generation' of electric energy which appeared in the Senate bill. The conference substitute *follows the language of the House Amendment* but inserts a clause relating to generation to the extent regulation thereof is provided in this Part and the Part next following. * * * The same general differences between the Senate bill and the House Amendment has been followed with a *clarifying phrase* added to remove any doubt as to the Commission's jurisdiction over the facilities used for the generation and local distribution of electric energy *to the extent provided in other sections* of this Part and the Part next following." (Italics supplied)

This Committee report makes it plain that no change in the purpose of the bill, as passed by the House, with respect to generating facilities was designed by the Conferees. The phrase added was a "clarifying phrase", to make clear what had previously been the intention of the House, and was inserted only "to remove any doubt" that such jurisdiction as was specifically conferred "in other sections" of the Act was not intended to be negatived.

The idea that the so-called "but" clause was a confirmation of jurisdiction in the Commission, and not an exception therefrom, was something new in the opinion below. Quite plainly the Commission had no doubt that the clause was designed to effect exceptions from its jurisdiction. In its opinion, the Commission asserted its jurisdiction over the facilities in question, *not upon the ground that the "but" clause was not an excepting clause* but upon the ground that the exception as to generating facilities "is itself subject to a further exception, to wit, 'except as specifically provided in this Part and the Part next following.'"

The Commission points out that under Section 207, 301 (a), and 308 it may issue orders to public utilities which require information with respect to the cost of facilities used for generation, or which require accounts to be kept respecting generation, or which require improvements in service which may involve generation. From these provisions of Parts II and III the Commission concludes that the exception in the "but" clause negatives the application of that exception clause to the facilities in question in this case.

This not only disregards the guiding declaration of Congress in Section 201(a) but it disregards the limited character of the exception within the "but" clause, and the purpose of that clause itself.

The "but" clause is a limitation upon the words: "The Commission shall have jurisdiction over all facilities for such transmission or sale * * *". The "but" clause provides that such grant of jurisdiction shall not apply to give the Commission "jurisdiction * * * over facilities used for the generation of electric energy". The purpose of that exception is obvious. Congress recognized that a generating company must make sales of its energy, and that it might be argued that such sales, in cases where the energy was transmitted into another State, constituted sales in interstate commerce. It therefore negatived that contention by the exception in the "but" clause, the effect of which was to withhold the facilities of generating companies used in generation (and in sale at the point of generation) from being placed within the jurisdiction of the Commission by Section 201(b).

The Congress, however, included within the "but" clause the words "except as specifically provided in this Part and in the Part next following." The purpose of this exception within the exception clause is likewise obvious. By said Section 207, 301(a) and 308 of the same Act, the Commission was specifically granted jurisdiction touching generation. Also in Section 202(c) and (d) it was provided that in time of war or of national emergency the Commission

should have power "to require by order such temporary connection of facilities and such generation * * * of electric energy" as the Commission should find requisite in the public interest. Persons not otherwise subject to the jurisdiction of the Commission, however, were not to become "public utilities" by reason of conformity to requirements made by the Commission under Section 202(c) and (d).

By these several sections, the Commission was specifically enabled to exercise jurisdiction for certain purposes under certain circumstances as respects generation, under Parts II and III. It was not intended that such jurisdiction should be affected by the exception incorporated in the "but" clause in Section 201(b). Accordingly, Congress inserted the exception within the "but" clause.

Such insertion, however, merely prevented the jurisdiction specifically granted as aforesaid from being brought into question. It did not have the effect of bringing all owners of generating facilities within the jurisdiction of the Commission. It was designed only to negative any possible question as to the full jurisdiction of the Commission, in the exercise of the powers specifically granted in Parts II and III, over utilities otherwise marked as "public utilities."

The distinguishing mark of a "public utility", as defined in Section 201(e), is the ownership or operation of facilities subject to the jurisdiction of the Commission by subsection (b) of the same Section 201. Those are the facilities used in the transmission, or in the sale at wholesale, in interstate commerce of electric energy,—other than the facilities of a generating company used in generating electric energy sold at the point of generation.

It is facilities used in *generation* upon which the Commission relies as bringing Hartford within its jurisdiction.

The court below cites *Peoples Natural Gas Company* v. *Federal Power Commission,* 127 Fed. (2d) 153, as supporting its construction. In that case the District of Columbia Court of Appeals construed a similar "but" clause, in the Natural Gas Act, as not precluding it from holding subject

to the Commission's jurisdiction a sale of natural gas by the Peoples Natural Gas Company in Pennsylvania to another utility, which immediately transported to New York, for distribution to the public.

We do not digress from this case to argue the *Peoples Natural Gas Company case;* but the Peoples Natural Gas Company is the same company which was a party to *Peoples Natural Gas Company* v. *Public Service Commission,* 270 U. S. 550, from the opinion in which it appears that the Peoples Company is engaged in sales to consumers and for resale in Pennsylvania, its operations being described in part as follows:

> "The Peoples Company is a public service corporation created under the laws of Pennsylvania and engaged in producing, purchasing, transporting by pipe line, and selling natural gas. *It purchases about two thirds of the gas which it transports and sells from a producing company in West Virginia* having pipe lines *leading from wells in that state to the boundary between the two states;* and it produces the other one third from its own wells in the southwestern counties of Pennsylvania. It has a system of pipe lines in Pennsylvania *which is connected at the state boundary with the lines of the West Virginia company* and leads thence to Pittsburgh, Johnstown, and other Pennsylvania cities and boroughs where it sells the gas." (Italics supplied)

The *Peoples Natural Gas Company case* was decided on the pleadings. The Company's contention seems to have been that it was not engaged in interstate transportation of natural gas because all of its transportation was within Pennsylvania. In a statement for the People Company in the District of Columbia Court of Appeals, printed in the appendix to the brief for the Federal Power Commission in that court, counsel for the Company said:

> "The Peoples Natural Gas Company operates exclusively in Pennsylvania. All of its properties are in Pennsylvania. Its primary business is supplying gas to the City of Pittsburgh and its environs. It also

> supplies gas to various other communities in western Pennsylvania. Its lines begin near the southerly line. * * * In the last two years or so the supply of the New York State Natural Gas Corporation has failed, and there are times when the demands of the New York State Natural Gas Corporation are such that some gas is sold and delivered by the Peoples Company to the New York State Natural Gas Corporation; but that delivery is made at a point in Pennsylvania a hundred miles or so from the New York State line, within the Commonwealth of Pennsylvania. * * * so far as the New York State Natural Gas Corporation is concerned, the station at which the delivery is made is at the northern end of the field from which gas is produced. True, *some of it is conveyed as much as 25 miles, perhaps further.* All of that is in Pennsylvania, however, and within the producing basin." (Italics supplied)

That case can scarcely be called analogous to this case. Peoples Natural Gas Company was plainly a "public utility", as defined in the Natural Gas Act, and the sale by it to the New York Company, for resale, was plainly subject to the Act.

For a construction of the "but" clause of the Natural Gas Act, as applied to a producer, pure and simple, we point to an opinion of the Federal Power Commission in the *Columbian Fuel Corporation case,* 35 P. U. R. (N. S.) 3. Under the doctrine laid down in *Gray* v. *Powell et al.,* 314 U. S. 402, 413, this early construction of the Natural Gas Act by the Commission, whereby it determined that it was without jurisdiction over producers selling at the point of production, basing its construction upon the clearly evidenced intent of Congress, will receive its appropriate weight whenever this court shall come to construe the "but" clause in the Natural Gas Act. Had the Commission paid the same deference to the legislative will in this case which is paid in the *Columbia Fuel Corporation case,* this case would not be before this court.

Upon the face of the Federal Power Act, read in the light of its legislative history, the purpose of Congress to

accomplish the exclusion of generating companies from Federal regulation, by the exclusion of their facilities from the jurisdiction of the Commission, seems clear beyond opportunity for reasonable question. At the very least it must be admitted that the Act leaves the Commission's jurisdiction doubtful. There is no reasonably explicit statement of the purpose of Congress to grant the Commission jurisdiction in a case such as this.

If there be doubt, the doubt should be resolved in favor of the preservation to the States of a governmental power which was undoubtedly theirs prior to the passage of the Federal Power Act, under the decision of this court in *Utah Power and Light Company* v. *Pfost.* 286 U. S. 165. The court made it plain in a very recent decision that legislation will not be construed in derogation of state powers except when the intent to withdraw or override those powers is clearly expressed. *Penn Dairies, Inc.* v. *Milk Control Commission of Pennsylvania* (Decided March 1, 1943.)

The Commission in its opinions attached much importance to the fact that prior to its sale of the sub-station and other transmission facilities Hartford was a member of the Exchange, and, as such, engaged in exchange transactions, whereby power generated by it was transported into Massachusetts, where it was sold and consumed. Touching those facts, the Association in its brief in the court below said:

> "To us these facts seem utterly insignificant * * *. Hartford had the right to sell the property which it did sell. No one questions that. Hartford also had the right to elect to confine its activities to those which the Federal government has not undertaken to regulate. * * * We submit that whether Hartford is or not subject to the Federal Power Act depends upon the facts as to its present ownership or operation of property subject to the Commission's jurisdiction. If it does not own or operate such property, the fact that it once did is entirely irrelevant. It is irrelevant also that Hartford disposed of the facilities outside its generating plant for the purpose of avoiding regulation by the

Federal Power Commission. Congress established the line of demarcation between electric utilities over which the Federal Power Commission should have jurisdiction and those which should be free from such jurisdiction. Hartford had the right, if it could, to place itself on that side of the line where it chose to be.

"The applicable rule was very clearly expressed by Mr. Justice Holmes in *Superior Oil Company* v. *Mississippi*, 280 U. S. 190, (in which it was said:)

"'The only purpose of the vendor here was to escape taxation. It was not taxed in Louisiana, and hoped not to be in Mississippi. The fact that it desired to evade the law, as it is called, is immaterial, because the very meaning of a line in the law is that you intentionally may go as close to it as you can, if you do not pass it.'"

The court below disclaimed basing its opinion upon any theory of agency or affiliation, or upon the fact that Hartford sold its facilities for the purpose of avoiding the jurisdiction of the Commission; but the court does appear to have attached great weight to the knowledge of Hartford that part of the energy sold by it to Connecticut was being transmitted outside of the State where it was sold and consumed.

We submit that the fact of such knowledge on the part of Hartford is just as irrelevant and inconsequential as its original ownership, and later sale of the transmission facilities just mentioned.

When the Senate proposed to declare necessary in the public interest "Federal regulation of that part of such business which consists of * * * the generation of electric energy for such transmission and sale (in interstate commerce)", it was proposing to provide regulation for exactly the character of sales here involved; and when the House, and finally the Congress, determined to exclude from Federal regulation the generating business it knew that it was excluding a large volume of such sales. It did not choose to make this exclusion dependent upon ignorance by generating utilities of the interstate use of energy sold by them.

It would be a strange law that would make the jurisdiction of a Federal commission dependent, not upon the character of the operations to be regulated, but upon the extent of the knowledge of utilities producing electric energy as to the disposition of such energy after sale.

No question of Federal power is presented by this case. We are not questioning here the power of Congress to regulate the generation of electric energy produced for transmission and sale in interstate commerce. The question is what Congress intended to bring under regulation by the Commission; and the Commission should be held to the exercise of the jurisdiction which Congress intended to grant. *Federal Trade Commission* v. *Bunte Bros.*, 312 U. S. 249, 355.

The opinion below pays lip service to the rule just mentioned, but applies another. Having declared the "but" clause, in so far as interstate generation and transmission and sale in interstate commerce are concerned, not a limiting but a confirming clause, the opinion considers a contrary construction, saying:

> "Regarding the 'but' clause as an exception, and keeping in mind the obvious purpose of Congress, disclosed in the legislative history, to see to it that there was effective regulation of interstate wholesale sales of electrical energy, we consider as pertinent the 'elementary rule requiring that exceptions from a general policy which a law embodies *should be strictly construed* * * *'.
>
> "The point is that it is not as such that the generation facilities are subject to the Commission's jurisdiction under Sec. 201(b), but as facilities used in the business of *knowingly* selling electric energy wholesale in interstate comerce. It is *the fact of petitioner's knowledge* which should dissipate the apprehension expressed in the brief of amicus curiae that the result of a decision sustaining the Commission in this case 'will be to bring under the Commission's jurisdiction every generating company which generates any electric energy which finds its way into interstate commerce.' We are not holding, nor did the Commission hold, that

the Act has 'the effect of bringing all owners of generating facilities' with that jurisdiction." (Italics supplied)

The rule which was applied by the court below is plainly the exact reverse of the rule declared by this court in *Penn Dairies, Inc.* v. *Milk Control Commission of Pennsylvania,* cited supra.

It may also be observed that the declaration in the opinion below, as to the limited effect of the holding below, can scarcely remove the "apprehension expressed in the brief of amicus curiae" inasmuch as it is true, as the footnote to the opinion admits,—oddly enough in view of the expression of assurance,—that "once it is decided that the Commission has 'jurisdiction' over any of petitioner's facilities, then the petitioner is a 'public utility', and the Commission is then vested with specific powers under the several sections of the Act which refer to a 'public utility';".

These powers, referred to in the quotation, include the power to regulate rates and service. Unless Congress, by the Federal Power Act, has so far occupied the field as to prevent, the Connecticut Commission can regulate the service of Hartford to Connecticut and other distributing companies in that State, and can regulate the rates for such service, regardless of the use in interstate exchange transactions of a part of the energy received by Connecticut.

The point is that Congress by the language of the Federal Power Act, and by the declarations of its committees, in charge of the bill, has made evident its purpose not to extend Federal regulation to the business of the production of electric energy. Sales are an inevitable part of the business of production, and facilities used in such sales are a part of the facilities, of whatever character, used in that business, and, as such, are expressly excluded from the Commission's jurisdiction by Section 201(b).

The fact that such inevitable sales may be of a character which might be held "in interstate commerce," and thus might be subject to Federal regulation, if Congress should so determine, is irrelevant. The facilities having been ex-

cluded by Congress from the Commission's jurisdiction, for the very purpose of excluding the generating business from Federal regulation, that purpose can not properly be nullified by declaring the facilities under the Commission's jurisdiction because they are used in making such inevitable sales.

We ask that the writ be granted, to the end that the court may hold that the Congress has manifested its purpose to exclude generating companies from regulation under the Federal Power Act, and that the Commission must yield obedience to the will of Congress.

Respectfully submitted,

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INDEX

CITATIONS

In the Supreme Court of the United States

OCTOBER TERM, 1942

THE HARTFORD ELECTRIC LIGHT COMPANY,
PETITIONER

v.

FEDERAL POWER COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the United States Circuit Court of Appeals for the Second Circuit (R. III, 1293)[1] is reported in 131 F. (2d) 953. The Federal Power Commission's opinions and orders (R. III, 1060, 1073; 1726, 1282) are reported in 37 P. U. R. (N. S.) 193, 201 and 44 P. U. R. (N. S.) 515, 519.

JURISDICTION

The judgment of the Circuit Court of Appeals (R. III, 1320) was entered February 2, 1943. The

[1] The three volumes of printed record filed with the petition in this case will be referred to as R. I, R. II, and R. III, respectively.

petition for a writ of certiorari was filed on March 16, 1943. Jurisdiction of this Court is invoked under Section 313 (b) of the Federal Power Act (49 Stat. 860, 16 U. S. C. 825*l*), and Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Petitioner, The Hartford Electric Light Company, maintains a steam electric generating plant in Hartford, Connecticut. Three circuits leading from petitioner's busses in that plant connect at the plant wall with an adjacent transmission substation owned and operated by The Connecticut Power Company ("Connecticut Power"). A transmission line leads northward from this substation to a point in Massachusetts where it interconnects with the facilities of a Massachusetts utility, the line being owned and operated in Connecticut by Connecticut Power and in Massachusetts by the Massachusetts utility. Pursuant to contract, petitioner sells electric energy to Connecticut Power to the extent of the latter's requirements in Connecticut. In addition, petitioner regularly sells Connecticut Power a substantial further amount of energy which petitioner knows is transmitted by Connecticut Power to Massachusetts for resale and ultimate consumption in that State.

The Federal Power Commission's order in the present proceeding directs petitioner to comply

with previous Commission orders under the Federal Power Act, which prescribe a uniform system of accounts for public utilities subject to the Act and call for the submission of certain cost data by such utilities. Petitioner challenges the Commission's jurisdiction over it, contending that it is not a "public utility" within the meaning of the Act.

The question presented is:

Whether petitioner owns or operates facilities for the sale or transmission of electric energy in interstate commerce within the meaning of Section 201 (b) of the Federal Power Act, and is therefore a "public utility" as defined in Section 201 (e) of the Act.

STATUTE INVOLVED

The relevant sections of the Federal Power Act are set forth in the Appendix, *infra*.

STATEMENT

The Circuit Court of Appeals affirmed orders of the Federal Power Commission whereby petitioner, The Hartford Electric Light Company, having been found to be a "public utility," was directed to keep its accounts in accordance with the accounting requirements previously prescribed by the Commission (R. II, 821, 836, 842; R. I, 18) for "public utilities" subject to the Federal Power Act.

For ten years immediately preceding passage of the Act, petitioner owned and operated facili-

ties for the transmission and sale at wholesale of electric energy in interstate commerce, through interconnections by which it interchanged electric energy with a Massachusetts electric company. Petitioner admits that it would "probably" have become subject to the Commission's regulation under the new Act (R. III, 1196, 1155–1156). However, on Sunday, August 25, 1935, the day before the Act was approved by the President, petitioner severed the interconnections at the Connecticut-Massachusetts boundary (R. I, 316–320, 339; R. II, 816–817). Petitioner further admits that this connection was severed for the sole purpose of avoiding Federal regulation (Ex. 30, Tr. 1930).[2]

Petitioner then sought an order or interpretation of the Act by the Commission which would have enabled it to resume the interstate energy transactions without becoming subject to regulations under the Act (Ex. 30, printed in part only, R. II, 809; see Tr. 1923–51). Failing in those efforts, petitioner then transferred title to its South Meadow, Connecticut, transmission substation to The Connecticut Power Company ("Connecticut Power") which it controlled (R. I, 87, 107, 46 (Hearings before Committee on Interstate Commerce, U. S. Senate, 74th Cong., 1st session, on S. 1725, April 24, 1935, pp. 497–498), and which already owned the transmission line

[2] The reference "Tr." is used to indicate pages of the Record which have not been printed.

from the substation to the Massachusetts boundary. The interstate transactions were then resumed, with Connecticut Power supplying to the Massachusetts companies electric energy which it received principally from petitioner and receiving from the Massachusetts companies electric energy which it supplied principally to the petitioner (R. I, 44, 84, 324, 326, 104, 115, 85). Physically there was no change in the electric energy transfers, and the physical scheme of operation is the same as it was before the Federal Power Act was enacted (admitted, R. III, 1136–1137; see R. I, 344, 110, 115–116, 119–120).

The electric facilities and operations involved may be described as follows:

Adjoining and interconnected with petitioner's South Meadow generating plant (R. I, 70–71) is the South Meadow transmission substation which petitioner originally owned but which it transferred to Connecticut Power (R. I, 86, 99–101, 286–288, 265). A double-circuit transmission line leads northward from the substation to Agawam, Massachusetts, where it interconnects with facilities of Turner Falls Power & Electric Company and, through them, with facilities of the New England Power Company yet farther north. There are no taps on this line between Hartford and Agawam (R. I, 98, 285, 319) and it is owned in Connecticut by Connecticut Power and in Massachusetts by the Turners Falls Power & Electric Company (R. I, 98, 101–102). The transmission

line distance to the State boundary is less than 30 miles (R. I, 285). A similar line over 60 miles long owned by Connecticut Power leads from the South Meadow substation to Falls Village in the northwestern part of Connecticut, and has a number of taps to supply substations en route (R. I, 98, 285). Energy supplied by petitioner's South Meadow plant to Connecticut Power flows out on the line to Falls Village and the line to Agawam, Massachusetts, as the loads require (R. I, 357, 324, 98, 285).

The generators in petitioner's South Meadow plant are connected to a "Main Bus" and an alternate bus in the plant by circuits made up of conductors, disconnecting switches, and oil circuit breakers (R. I, 265, 134; R. II, 819). Numerous circuits connected to those busses, including disconnecting switches and oil circuit breakers, are used in the distribution and transmission of electric energy in Hartford and to other places in Connecticut (R. I, 265, 139; R. II, 819), but there are three circuits which lead through bushings in the wall of the plant building to the adjacent substation now owned by Connecticut Power (R. I, 99, 139). Inside the plant building these three circuits are owned by petitioner, and outside the building they are now owned by Connecticut Power (R. I, 36–37). Energy delivered by petitioner over these three circuits "is measured by meters" owned by petitioner which are "connected in the bus structure inside the generating

station" (R. I, 100). Both watt meters and watt-hour meters are provided and read hourly (R. II, 819) and records of these readings are kept on log sheets (R. I, 364, 324; R. II, 820; R. I, 88–89). Outside the wall bushings each of the three circuits passes through a substation transformer [3] to the 66-kilovolt "bus" to which the Agawam and Falls Village connect.

By means of these facilities 166,144,000 kilowatt-hours of electric energy from petitioner's South Meadow steam plant were supplied to Connecticut Power in the first nine months of 1939, of which 97,932,000 kilowatt-hours (or about 59%) were sent on the Hartford-Agawam line to Massachusetts (R. II, 817). From June 1 to September 30, 1939, approximately a third of the net generation at petitioner's plant was sent to Massachusetts (R. II, 817), reaching a maximum for one hour of 62% (57% of gross, R. II, 820, plus 5% for net, R. I, 365).[4]

[3] The transformers raise the voltage from 11 to 66 kilovolts (R. II, 819; R. I, 99–101) and reduce the amperage in inverse ratio, thereby reducing the size of the copper conductors required in the line and making long distance transmission economically feasible (R. I, 134–139, 160–162, 184–185, 102; R. II, 758–759), but the intangible electric energy (ability of an electric system to do work (R. I, 508; R. II, 572; R. I, 436, 167; R. II, 678)) is not changed (R. I, 521, 147–148; R. II, 914, 916, 957).

[4] No question is raised as to the sufficiency of the energy transactions, so far as amount is concerned, to support the Commission's jurisdiction (R. III, 1124–1125).

Connecticut Power pays petitioner the incremental cost of the electric energy which it receives from petitioner (R. I, 81, 84, 333), and petitioner's sales to Connecticut Power are admittedly sales at wholesale as defined in Section 201 (d) of the Act (R. III, 1181–1182).

Petitioner admittedly knows that the amount of electric energy it sells to Connecticut Power exceeds the latter's load requirements in Connecticut and that such excess is utilized by Connecticut Power in connection with the operation of the Connecticut Valley Power Exchange and that in such operation energy is transmitted across the State boundary to Massachusetts (Supp. Ans., pars. 24, 26; R. I, 44–45, 84) where it is used (except for losses) for supplying ultimate consumers (R. I, 112–113, 114). Petitioner further concedes that the supply of energy by petitioner is essential to the operation of the Exchange R. III, 1198).

The Commission determined that petitioner was a "public utility" upon finding that petitioner owns and operates facilities, including those between its generators and the bushings in the wall of its South Meadow plant, for the sale of electric energy at wholesale in interstate commerce and for the transmission of that energy in interstate commerce (R. III, 1063); and accordingly ordered petitioner to comply with its previous orders requiring "public utilities" subject to

the Act to maintain a uniform system of accounts and to submit certain cost data concerning their plants (R. III, 1060, 1073–1074). After rehearing, granted upon petitioner's application, the Commission affirmed its previous opinion and order (R. III, 1276–1283). A subsequent application for another rehearing (R. III, 1284–1287) was denied (R. III, 1290). The Circuit Court of Appeals sustained the Commission's determination of jurisdiction on the basis of petitioner's ownership and operation of facilities for sale, and accordingly did not pass upon the Commission's findings with respect to transmission facilities (R. III, 1293–1319; 131 F. (2d) 953, C. C. A. 2d).

ARGUMENT

Section 201 (b) defines the coverage of Part II of the Act and the scope of the Commission's jurisdiction thereunder. It first provides that Part II "shall apply to the transmission of electric energy in interstate commerce and to the sale of electric energy at wholesale in interstate commerce." It then commits to the Commission jurisdiction over "all facilities for such transmission or sale," but not, except as specifically provided in Parts II and III, "facilities used for the generation of electric energy or * * * used in local distribution or only for the transmission * * * in intrastate commerce, or * * * for the transmission of electric energy consumed wholly by the transmitter." Section 201 (e) defines public util-

ity as "any person who owns or operates facilities subject to the jurisdiction of the Commission." Section 301 (a) requires every "public utility" to keep such accounts as the Commission may prescribe, with a specific proviso that "nothing in this Act shall relieve any public utility from keeping any accounts * * * required * * * by or under authority of the laws of any State." Section 208 authorizes the Commission to investigate the actual legitimate cost of, and depreciation in, the property of every public utility and requires such utilities to submit information concerning the cost of its property upon the Commission's request.

The court below correctly held that petitioner owned and operated facilities for the sale of electric energy at wholesale in interstate commerce, was therefore a "public utility" within the meaning of Section 201 (e) of the Act, and was thus bound to comply with orders issued by the Commission pursuant to Sections 208 and 301 (a) of the Act.

1. Petitioner concedes that its sales of electric energy to Connecticut Power are "at wholesale", within the meaning of Section 201 (d) of the Act (R. III, 1181–1182). It contends, however, that the sales are not "in interstate commerce," relying chiefly on *Superior Oil Co.* v. *Mississippi,* 280 U. S. 390, and *Utah Power and Light Co.* v. *Pfost,* 286 U. S. 165. But the contrary holding below is correct. Petitioner not only admits knowledge that the energy it supplies is de-

livered by Connecticut Power to Massachusetts utilities, but acknowledges that the very purpose of the sales in excess of Connecticut's local requirements is to maintain the flow of electric energy from petitioner's plant to out-of-state destinations.[5] In these circumstances, and particularly since the interstate transit of the electric energy is not only continuous (cf. *Texas & N. O. R. R. Co.* v. *Sabine Tram Co.*, 227 U. S. 111, 124, 130) but practically instantaneous,[6] the sales in question are governed by the principle that "where commodities are bought for use beyond state lines, the sale is a part of interstate commerce" (*United States* v. *Rock Royal Co-operative*, 307 U. S. 533, 568–569). *Cf. Dahnke-Walker* v. *Bondurant*, 257 U. S. 282, 290–291; *Lemke* v. *Farmers Grain Co.*, 258 U. S. 50, 55; *Flanagan* v. *Federal Coal Co.*, 267 U. S. 222; compare *Overstreet* v. *North Shore Corporation*, No. 284, this Term, decided February 1, 1943.

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[5] R. I, 84–87. There is thus no room here for the application of *Superior Oil Co.* v. *Mississippi*, 280 U. S. 390, 394–395, where the seller's "indifferent knowledge" that the buyer contemplated interstate disposition of the goods sold was held too remote to attach such an interstate character to the sale as to prevent state taxation of the seller in connection therewith. *Cf. Addyston Pipe & Steel Co.* v. *United States*, 175 U. S. 211, 243; *United States* v. *Patten*, 226 U. S. 525, 543. Nor can there be any question here concerning the substantial nature of the sales in question. See pp. 7–8, *supra*.

[6] The flow of electricity is practically instantaneous in nature and continuously dependent upon maintenance of simultaneous consumption and generation (R. I, 331–332, 370–371, 214, 215; R. II, 1041–1042, 591).

This Court recently refused to review a case which held that a sale of natural gas at the beginning of interstate movement is a sale in interstate commerce within the meaning of the Natural Gas Act. *Peoples Natural Gas Co.* v. *Federal Power Commission,* 127 F. (2d) 153, 157–158 (App. D. C.), certiorari denied, 316 U. S. 700. Petitioner's attempted distinction,—that there the purchaser transported the gas to the state boundary and thence into the adjoining state, while here the purchaser's ownership of transmission facilities extends only to the state boundary where it "delivers" the energy for transmission into the adjoining state—is unavailing. Transfer of title or custody en route does not remove any part of an interstate movement from interstate commerce. See cases pp. 14–15, *infra.*[7]

To escape the application of these familiar principles and their unavoidable result, petitioner resorts to the language in Section 201 (a): "such Federal regulation, however, to extend only to

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[7] Petitioner's assertion that our view would "reverse" (Pet. 18) such cases as *Utah Power and Light Co.* v. *Pfost*, 286 U. S. 165, upholding a state tax on electrical generation, and *Oliver Iron Mining Co.* v. *Lord*, 262 U. S. 172, sustaining a state occupation tax on the business of mining ores, is unfounded.

The *Utah Power and Light Co.* and *Oliver Iron Mining Co.* cases were concerned solely with production and not sale. Thus neither case provides any answer to the question whether a sale at the beginning of the interstate transmission is a sale "in interstate commerce" within the meaning of the Federal Power Act.

those matters which are not subject to regulation by the States". Petitioner claims that this was intended to be the criterion of what constitutes interstate commerce regulable under the Act; and, therefore, that the determinative question, which it asserts must be answered in the affirmative, is whether the transactions in question were subject to the jurisdiction of the "Connecticut Commission". (Pet. 20). But Section 201 (a) is of no aid to petitioner, even accepting *arguendo* the premise inherent in petitioner's contention that its general declaratory provisions override the specific regulatory provisions of the Act. The meaning of the proviso is fundamentally a question of legislative intent which, so far as legal principles are involved, must be determined in accordance with Congress' understanding of the law at the time of enactment. *Cf. Parker* v. *Motor Boat Sales, Inc.*, 314 U. S. 244, 248–250. Like the legislation in the *Parker* case, the statute at bar was primarily de-

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Moreover, petitioner's reliance on these cases overlooks the traditional recognition that "enterprises subject to federal industrial regulation may nevertheless be taxed by the States without putting an unconstitutional burden on interstate commerce" (*Kirschbaum* v. *Walling*, 316 U. S. 517, 521). See also *Swift & Co.* v. *United States*, 196 U. S. 375, 400; *Stafford* v. *Wallace*, 258 U. S. 495, 525; *Binderup* v. *Pathe Exchange*, 263 U. S. 291, 311. The fact is that state taxation of the very instrumentalities of interstate commerce is historically permissible. See, e. g., *Adams Express* v. *Ohio*, 165 U. S. 194, 220; *Southern Railway* v. *Watts*, 260 U. S. 519, 530.

signed to close a regulatory gap revealed by judicial decision—in this instance *Public Utilities Comm.* v. *Attleboro Co.*, 273 U. S. 83.[8] The pertinency of that decision to the transactions here in issue is not affected by the intervention of Connecticut Power between petitioner and the out-of-state purchasers. It was well established at the time of that decision that the interstate character of particular commerce was not affected by such circumstances as the transfer of title or custody in the originating state or en route (cf. *Texas & N. O. R. R. Co.* v. *Sabine Tram Co.*, 227 U. S. 111, 130; *Southern Pacific Terminal Co.* v. *Interstate Commerce Commission*, 219 U. S. 498, 526; *Western Union Tel. Co.* v. *Foster*, 247 U. S. 105, 113; *United Fuel Gas Co.* v. *Hallanan*, 257 U. S. 277, 280-281; *Peoples Gas Co.* v. *Public Service Commission*, 270 U. S. 550, 554) or the mingling

[8] "The decision in the Supreme Court in *Public Utilities Commission* v. *Attleboro Steam & E. Co.* (273 U. S. 83) placed the interstate wholesale transactions of the electric utilities entirely beyond the reach of the States." S. Rep. No. 621, 74th Cong., 1st Sess., on S. 2796, p. 17. Cf. *ibid.* p. 48. See also H. Rep. No. 1318, 74th Cong., 1st Sess., on S. 2796, pp. 7–8; Hearings before the Committee on Interstate Commerce, U. S. Senate, 74th Cong., 1st Sess., on S. 1725, pp. 250, 767, 800; Hearings before the House of Representatives, 74th Cong., 1st Sess., on H. R. 5423, pp. 384, 436, 497–498, 1340, 1614, 1656–1657, 2144.

It is thus immaterial whether as an original question the *Attleboro* case would be decided the same way today. Compare *Parker* v. *Brown*, No. 46, this Term, decided January 4, 1943.

of the subjects of interstate commerce with those of intrastate commerce (*Peoples Gas Co.* v. *Public Service Commission, supra,* at 554–555; Cf. *Cooney* v. *Mountain States Telegraph & Telephone Co.,* 294 U. S. 384, 391–394; *Smith* v. *Illinois Bell Telephone Co.,* 282 U. S. 133). Consequently, even adopting the most restrictive view of Section 201 (a) with respect to the scope of federal jurisdiction, petitioner is engaged in the sale of electric energy in interstate commerce within the meaning of the Federal Power Act.[9]

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[9] As shown by the brief and oral argument for respondent in Nos. 299 and 329, this Term, argued January 4–5, 1943, reargued March 4–5, 1943, we are of the opinion that Section 201 (a) should not be construed to narrow the scope of the federal regulation expressly provided for in the succeeding regulatory provisions.

That Congress did not intend to make the mere fact that there is a State law or State commission regulation of a particular matter a basis for exempting such matter from the Federal Power Act is shown by the elimination by the Conference Committee (Conference Report, House of Representatives, Report No. 1903, 74th Cong., 1st sess., on S. 2796, August 23, 1935, p. 75) of an additional subsection (b) to Sec. 318, which had been adopted in the House (Congressional Record, Vol. 79, Part 10, pp. 10574–10575, 74th Cong., 1st sess., July 1, 1935). That amendment provided:

> "If, with respect to the issue, sale, or guaranty of a security, the method of keeping accounts * * * or any other requirement of this part or the next preceding part * * * any person is subject to the law of any State or regulation by a State commission, such person shall not be subject to the requirements of this part or the next preceding part * * * with respect to the same subject matter."

Indeed, any other conclusion would be inconsistent with the fundamental purpose of the Act to provide for federal rate regulation in the gap revealed by the *Attleboro* decision.[10] The Commission's unquestioned jurisdiction to fix rates for Connecticut Power's resale of the energy in question (Section 206 (a)) would be emasculated if it were denied control over the wholesale rates which petitioner charges Connecticut Power for the same energy.

2. Petitioner contends that it is not a "public utility" under the Act because it allegedly owns

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[10] The legislative history of the Act is clear that a sale at wholesale in interstate commerce when the sale was made by the producer is not thereby exempt. Mr. John E. Benton, General Solicitor of the National Association of Railroad and Utilities Commissioners, testifying at the hearings before the Committee on Interstate and Foreign Commerce, House of Representatives, 74th Cong., 1st sess., on H. R. 5423, said (p. 1622):

> The States * * * cannot reach the interstate *producer* supplying the distributing company.
>
> The rates fixed in these wholesale transactions necessarily affect the rates to consumers. They are wholly unregulated. The State commissioners favor the filling of this gap by well-considered legislation enacted by Congress, which is the only body that can legislate. [Emphasis supplied.] (See also his testimony to the same effect at the Hearings before the Committee on Interstate Commerce, U. S. Senate, 74th Cong., 1st Sess., on S. 1725, p. 757.)

Mr. Benton expressly disclaimed before the Federal Power Commission ever having contended that Congress should not go behind the company which actually makes the transfer across the State line (R. III, 1215).

and operates no property "except its generating plant and its local distribution system" (Pet. 20), both of which it claims are placed wholly beyond the ordinary jurisdiction of the Commission by the second sentence of Section 201 (b).

But there is no difficulty in identifying facilities which, as the Commission and the court below correctly determined, are owned and operated by petitioner for its sales in interstate commerce.[11] Such facilities, in addition to generating equipment, consist of the electrical apparatus for conducting, controlling and measuring the energy sold between the generators and the wall bushings, at which point petitioner's facilities connect with

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[11] In its findings of fact, the Commission found that "Among the facilities owned and operated by Hartford and used in the sale at wholesale * * * of electric energy are the facilities from the connections on its generators to the bushings on the wall of its steam generating plants" (R. III, 1063). In its opinion, it noted further that such "physical facilities are *only some, but by no means all, of the facilities* used in the sale of electric energy. The entire corporate organization of Hartford, its contracts, its books of account, its instrumentalities for billing and collecting, as well as its electric facilities, are used in the sale of electric energy in interstate commerce" (R. III, 1070).

The entire court below found the necessary facilities for petitioner's interstate sale in its "corporate organization, contracts, accounts, memoranda, papers and other records, in so far as they are utilized in connection with such sales" (R. III, 1307–1308), and a majority of the court were further of the opinion that petitioner's "generation facilities, where used as aids to such sales, are within the Commission's jurisdiction under § 201 (b)" (R. III, 1308 *et seq.*)

Connecticut's.[12] They also include petitioner's business organization and records such as the log sheets of its meter readings. (See p. 7, *supra*.) The intervening apparatus between the generators and the wall bushings are the means by which the energy in question is delivered to the purchaser, and the business facilities the means by which the practical commercial aspects of the transaction are effected.

Petitioner contends further that all of the facilities outlined above are also used for generation and local distribution and therefore are excluded by the second sentence of Section 201 (b) from the Act's coverage (Pet. 15, 23). Petitioner's argument rests upon the presence of the word "only" in the reference to facilities used "for the transmission of electric energy in interstate commerce," and its absence from the references to facilities used for generation or in local distribution. But even if it be assumed that all the facilities in question are also used for generation and local distribution, it does not follow that

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[12] More specifically these facilities are: the circuits between the generators and the busses, including disconnecting switches and oil circuit breakers; the main and alternate busses; the circuits to the wall bushings, including disconnecting switches, oil circuit breakers, watt meters, and watt-hour meters (Pet. Ex. 2, R. I, 265; Commission Ex. 43, R. II, 819). These are facilities for the sale of electric energy in the same practical sense that a gasoline hose, valve, and measuring apparatus in a filling station are facilities for the sale of gasoline.

such facilities are thereby excluded from the Commission's jurisdiction. The second sentence of Section 201 (b) does not purport to prescribe blanket exemptions from the Commission's jurisdiction. On the contrary, it provides in terms that the facilities listed shall be subject to the jurisdiction of the Commission to the extent specifically provided in the Act. As the lower court held (R. III, 1310), one instance of such a specific provision consists in the immediately preceding grant of jurisdiction over all facilities for the sale of electric energy in interstate commerce.

Indeed, the construction advanced by petitioner would result in the anomaly that while the first sentence of Section 201 (b) makes the statute apply "to the sale of electric energy at wholesale in interstate commerce," the second sentence would limit the Commission's authority to sales effected by means of facilities used exclusively for that purpose.

Petitioner's contention would strip of significance the specific grant of jurisdiction, in the disjunctive, over facilities used for interstate sales, as distinguished from those used for interstate transmission. Moreover, evasion of the Act would become too easy. For example, even a utility operating an interstate transmission line could escape regulation simply by attaching the necessary apparatus to the line to permit some use in "local distribution." In petitioner's own case the

Act would fail of its primary purpose, the regulation of the type of wholesale transactions held beyond the reach of the states in the *Attleboro* case. In the light of the violence which such a construction would do to the specific grant of jurisdiction over interstate sales and the Congressional objective in enacting the legislation, the connotations which petitioner attaches to the placement of the word "only" in the second sentence of Section 201 (b) cannot be accepted. Cf. *Spokane & Inland R. R.* v. *United States,* 241 U. S. 344, 348–350.

The construction accorded to the Act by the court below, on the other hand, squares with the policy enunciated in Section 201 (a), declaring that "the business of transmitting and selling electric energy" is affected with a public interest—

> and that Federal regulation of matters relating to generation to the extent provided * * * and *of that part of such business* which consists of the transmission of electric energy in interstate commerce and the sale of such energy at wholesale in interstate commerce is necessary in the public interest * * *." [Italics supplied.]

Whether the interstate energy transactions amount to 3% of a company's production, as in the *Attleboro* case, or up to a peak of 62% as in this

case, the Federal Power Act was aimed at the necessity for the regulation of that part. It is also consistent with the familiar principle that a business partly engaged in interstate commerce may be regulated by the Federal government and that accounting requirements may properly encompass the intrastate as well as the interstate aspects. Cf. *Interstate Commerce Commission* v. *Goodrich Transit Co.*, 224 U. S. 194. This was in fact contemplated by Congress in connection with Section 301 of the Power Act. See S. Rep. No. 621, 74th Cong., 1st Sess., p. 53; H. Rep. No. 1318, 74th Cong., 1st Sess., pp. 30–31.[13]

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[13] There is also an alternate ground, noted but not passed upon by the lower court, for upholding the Commission's jurisdiction. The Commission determined that petitioner was also engaged in the transmission of electric energy in interstate commerce, finding that the intervening apparatus between petitioner's generators and the wall bushings, described, *supra*, p. 6, was used for such transmission, as well as interstate sale (R. III, 1063). In the court below, petitioner challenged this holding on the ground the facilities in question are classified as part of a generating plant in the Commission's accounting rules and in any event were too small to constitute a basis for jurisdiction (R. III, 1313). The Commission's view in this connection is supported by *Utah Power and Light Co.* v. *Pfost*, 286 U. S. 165, where this Court, in distinguishing between generation and transmission, said (286 U. S. at 181):

"* * * the process of transferring, as distinguished from that of producing, the electrical energy, begins * * * definitely at the generator, at which point measuring appliances can be placed and the quantum of electrical energy ascertained with practical accuracy."

CONCLUSION

The decision below is correct, and there is no conflict. The petition for certiorari should accordingly be denied.

Respectfully submitted.

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APRIL 1943.

APPENDIX

The pertinent provisions of the Federal Power Act of 1935, 49 Stat. 847 (16 U. S. C. sec. 824) are as follows:

> SECTION 201. (a) It is hereby declared that the business of transmitting and selling electric energy for ultimate distribution to the public is affected with a public interest, and that Federal regulation of matters relating to generation to the extent provided in this Part and the Part next following and of that part of such business which consists of the transmission of electric energy in interstate commerce and the sale of such energy at wholesale in interstate commerce is necessary in the public interest, such Federal regulation, however, to extend only to those matters which are not subject to regulation by the States.
>
> (b) The provisions of this Part shall apply to the transmission of electric energy in interstate commerce and to the sale of electric energy at wholesale in interstate commerce, but shall not apply to any other sale of electric energy or deprive a State or State commission of its lawful authority now exercised over the exportation of hydroelectric energy which is transmitted across a State line. The Commission shall have jurisdiction over all facilities for such transmission or sale of electric energy, but shall not have jurisdiction, except as specifically provided in this Part and the Part next following, over facilities used for the

generation of electric energy or over facilities used in local distribution or only for the transmission of electric energy in intrastate commerce, or over facilities for the transmission of electric energy consumed wholly by the transmitter.

(c) For the purpose of this Part, electric energy shall be held to be transmitted in interstate commerce if transmitted from a State and consumed at any point outside thereof; but only insofar as such transmission takes place within the United States.

(d) The term "sale of electric energy at wholesale" when used in this Part means a sale of electric energy to any person for resale.

(e) The term "public utility" when used in this Part or in the Part next following means any person who owns or operates facilities subject to the jurisdiction of the Commission under this Part.

(f) No provision in this Part shall apply to, or be deemed to include, the United States, a State or any political subdivision of a State, or any agency, authority, or instrumentality of any one or more of the foregoing, or any corporation which is wholly owned, directly or indirectly, by any one or more of the foregoing, or any officer, agent, or employee of any of the foregoing acting as such in the course of his official duty, unless such provision makes specific reference thereto.

* * * * *

SEC. 206 (a) Whenever the Commission, after a hearing had upon its own motion or upon complaint, shall find that any rate, charge, or classification, demanded, observed, charged, or collected by any public utility for any transmission or sale subject

to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order.

* * * * *

SEC. 208 (a) The Commission may investigate and ascertain the actual legitimate cost of the property of every public utility, the depreciation therein, and, when found necessary for rate-making purposes, other facts which bear on the determination of such cost or depreciation, and the fair value of such property.

(b) Every public utility upon request shall file with the Commission an inventory of all or any part of its property and a statement of the original cost thereof, and shall keep the Commission informed regarding the cost of all additions, betterments, extensions, and new construction.

* * * * *

SEC. 301. (a) Every licensee and public utility shall make, keep, and preserve for such periods, such accounts, records of cost-accounting procedures, correspondence, memoranda, papers, books, and other records as the Commission may by rules and regulations prescribe as necessary or appropriate for purposes of the administration of this Act, including accounts, records, and memoranda of the generation, transmission, distribution, delivery, or sale of electric energy, the furnishing of services or facilities in connec-

tion therewith, and receipts and expenditures with respect to any of the foregoing: *Provided, however,* That nothing in this Act shall relieve any public utility from keeping any accounts, memoranda, or records which such public utility may be required to keep by or under authority of the laws of any State. The Commission may prescribe a system of accounts to be kept by licensees and public utilities and may classify such licensees and public utilities and prescribe a system of accounts for each class. The Commission, after notice and opportunity for hearing, may determine by order the accounts in which particular outlays and receipts shall be entered, charged, or credited. The burden of proof to justify every accounting entry questioned by the Commission shall be on the person making, authorizing, or requiring such entry, and the Commission may suspend a charge or credit pending submission of satisfactory proof in support thereof.

* * * * *

SEC. 318. If, with respect to the issue, sale, or guaranty of a security, or assumption of obligation or liability in respect of a security, the method of keeping accounts, the filing of reports, or the acquisition or disposition of any security, capital assets, facilities, or any other subject matter, any person is subject both to a requirement of the Public Utility Holding Company Act of 1935 or of a rule, regulation, or order thereunder and to a requirement of this Act or of a rule, regulation, or order thereunder, the requirement of the Public Utility Holding Company Act of 1935 shall apply to such

person, and such person shall not be subject to the requirement of this Act, or of any rule, regulation, or order thereunder, with respect to the same subject matter, unless the Securities and Exchange Commission has exempted such person from such requirement of the Public Utility Holding Company Act of 1935, in which case the requirements of this Act shall apply to such person.

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